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No. 11028

2412

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHESTER BOWLES, Administrator of the Office
of Price Administration,

Appellant,

vs.

NORTHWEST POULTRY AND DAIRY PROD-
UCTS COMPANY, an Oregon Corporation,
and C. W. NORTON, President,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

AUG 14 1945

PAUL P. O'BRIEN,
CLERK

No. 11028

United States
Circuit Court of Appeals

For the Ninth Circuit.

CHESTER BOWLES, Administrator of the Office
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States
in the District of Oregon

Civil 2565

CHESTER BOWLES, Administrator of the Office
of Price Administration,

Applicant,

vs.

NORTHWEST POULTRY AND DAIRY PROD-
UCTS COMPANY, an Oregon Corporation,
and C. W. NORTON, President,

Respondent.

ORDER TO SHOW CAUSE

It appearing from the application filed herein and the annexed affidavit of D. E. Rodeback that the respondents, after request made upon them for permission to inspect and copy certain specified records, and after the service upon them of an inspection requirement issued and signed by the Administrator for the Office of Price Administration, have refused and do still refuse to permit the inspection and copying of said specified records, and the Court being fully advised in the premises, it is hereby

Ordered that the respondents and each of them appear and show cause on the 2nd day of October, 1944, at the hour of 10:00 o'clock A.M. before the undersigned Judge of the United States District Court for the District of Oregon, why an order should not be made requiring respondents and each

of them to permit duly authorized representatives of the Office of Price Administration to inspect and to copy the following records: All purchase and sales records and disbursement records covering the sale and purchase by the Northwest Poultry and Dairy Products Company of all turkeys from May 8, 1944, to and including August 10, 1944.

Dated at Portland, Oregon, this 19th day of September, 1944.

(Signed) CLAUDE McCULLOCH

United States District Judge

[Endorsed]: Filed Sept. 19, 1944. [1*]

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Come Now the respondents, Northwest Poultry and Dairy Products Company, an Oregon corporation, and C. W. Norton, President, and submit the following return to the order herein requiring them to show cause before Honorable Claude McCulloch, Judge of the United States District Court, for the District of Oregon, why an order should not be made requiring them, and each of them, to permit the duly authorized representatives of the Office of Price Administration to inspect and copy all records of purchase and sales and disbursements covering the sale and purchase by the respondent cor-

*Page numbering appearing at foot of page of original certified Transcript of Record.

poration of all turkeys from May 8, 1944, to and including August 10, 1944.

I.

The respondents admit paragraphs I, II and III of the application herein.

II.

As to paragraph IV thereof, the respondents admit that an oral request was made by certain employees of the Office of Price Administration on or about the 1st day of August, 1944, for permission to inspect and copy the respondents' records of the purchase, sales and disbursements above mentioned and that such [2] records were under the control of the respondents at that time. But the respondents deny that they, or either of them, refused to permit such inspection, and allege that they asked for time to consult their attorneys in Washington, D. C. and their local attorneys as to whether or not they were legally compellable to comply with said request, the same being based, as the respondents understood and believed, and still understand and believe, on order G-93 (F. R. 9-5287), which the respondents believed, and still believe, to be void, for the reasons specified *infra*. As to the other allegations in said paragraph the respondents deny that they have any knowledge or information sufficient to form a belief regarding the same.

III.

By way of a return to paragraph V of the application, the respondents admit the allegations there-

of, except the one relating to the alleged refusal of the respondents to permit the inspection in question, and as to that they reallege the explanation relating thereto set forth supra as to paragraph IV.

IV.

By way of a return to paragraph VI of the application, the respondents admit that the records in question are in their possession, but they deny the other allegations in said paragraph.

And as and for a further return to said order the respondents allege and show to the court the following facts:

I.

For the period of about eleven years last past, the respondent corporation has been engaged, at Portland, Oregon, in the business of wholesaler, processor and purchaser of turkeys, and the respondent, C. W. Norton, has been the manager of said [3] corporation in that business. During that period the growing, processing and marketing of turkeys in the States of Oregon and Washington has been, and it still is, one of the major industries of those states.

II.

During all of said period it has been the custom of the wholesalers, processors and purchasers of turkeys in those states to haul and pick turkeys for the growers on a per head basis, provided that they subsequently purchased the dressed turkeys; and during the latter part of that period the charge made by them for picking hens was 20c per head

and for picking toms 22c per head, plus 3c per head for hauling, making a total charge for picking and hauling of 23c for hens and 25c for toms.

III.

During the year 1943 a majority of said wholesalers, processors and purchasers of turkeys advanced this service charge to 25c per head on hens and 28c per head on toms. The Office of Price Administration charged that this was a violation of the Emergency Price Control Act of 1942 and amendments thereof and ruled that said service charge be reduced to the former figures of 23c on hens and 25c on toms.

IV.

In the month of November, 1943, the Office of Price Administration issued a ruling to the effect that the processor wholesaler was prohibited from purchasing dressed turkeys from the growers, although this had been the uniform custom in the above mentioned states for many years theretofore; in other words, that he could not pay the ceiling price fixed by the Office of Price Administration on dressed turkeys and charge the growers for the service of picking and hauling them, which ruling ignored and [4] disrupted the customary practice in said states which had obtained for the above mentioned period.

V.

Later in the month of November, 1943, the above ruling was changed to the effect that processors who

had dressed turkeys for farmers might continue to buy the turkeys on a dressed basis providing they did not exceed the ceiling of dressed turkeys. This ruling somewhat clarified the confusion brought about by the above mentioned regulations and the respondents and others in the same business believed that they would be able to carry on the business of handling turkeys in the customary manner and they continued to conform their business practices to said rulings in accordance with their best understanding.

VI.

On the 2nd day of May, 1944, said order G-93 (F. R. 9-5287) was issued by the Regional Administrator of the Office of Price Administration, at San Francisco, by the terms of which the maximum price for the service of custom processing all live turkeys in Region VIII (the States of California, Washington, Nevada, Oregon, except Malheur County and certain portions of the State of Arizona and certain portions of the State of Idaho) was adjusted as follows:

Type of Service	Hens	Toms
Kill and haul	\$.30 per head	\$.35 per head
Loose	.035 per lb.	.03 per lb.
Boxed	.045 per lb.	.04 per lb.

Certain definitions were included in said order, among them one to the effect that the service of custom processing of turkeys "loose" meant the assembling, killing, bleeding, plucking, [5] chilling, grading and head wrapping. A copy of said order

is hereto annexed marked Exhibit "A" and hereby made a part of this return.

VII.

Simultaneously with the issuance of the last mentioned order the Office of Price Administration, through its officers and employees in Portland, Oregon, issued an order, effective May 8, 1944, wherein the above mentioned portions of Order G-93 were repeated and certain interpretations added to the effect, among others, that the kill and haul charge might not be applied in addition to the loose or boxed charge; and that the above mentioned prices for said service were the only prices which might be charged therefor, that any charge of less than said prices would be considered an attempt to evade said price regulations and that any charge of more than those prices would be a violation of said order. A copy of the last mentioned order is hereto attached marked Exhibit "B" and hereby made part of this return. Said order applied only to the States of Washington and Oregon, except Malheur County in the latter state.

VIII.

In their said business the respondents, as wholesalers, processors and dealers, handle "loose" and "boxed" turkeys. The average weight of turkeys so handled by them is such that under the terms of said orders the service charge would amount to approximately 52½¢ per head for hens and 72¢ per head for toms. Such a charge is excessive, the

growers will not submit thereto and as a consequence the respondents' said business will be ruined if they are compelled to submit to the said regulations. [6]

IX.

Said orders and regulations are unlawful and void for the following reasons:

(a) The same are not authorized by the Emergency Price Control Act of 1942, or any amendments thereof, or by any other law. They are not maximum price regulations, but, on the contrary, are an attempt to fix arbitrary and inflexible prices for the service of processing "loose" or "boxed" turkeys.

(b) Said orders and regulations are discriminatory and unfair in that they do not purport to be of general application, restricted as they are to the State of Washington and the State of Oregon, except Malheur County; and do not purport to apply to all persons or corporations engaged in said business within that area, such as co-operatives, which are permitted to rebate to the growers of turkeys any overcharge resulting from compliance with such service regulations, while wholesalers, processors and dealers, such as the respondents, are prohibited from so doing. They are unfair and unjust and their enforcement would result in the denial to the respondents of the equal protection of the laws and would deprive them of their property without due process of law and without just compensation.

(c) Said orders and regulations are unlawful and void for the further reason that thereby an attempt is made to compel a change in the business practices, cost practices and methods established in the said industry in said locality and followed by the respondents and others for a long period of time before the enactment of the Emergency Price Control Act.

X.

By way of a further return to said order to show cause the respondents allege and show to the court that the said [7] respondent corporation has filed in said court, and there is now pending a suit in which said corporation, as plaintiff, prays for a declaratory judgment regarding the validity of said orders and regulations against the defendants therein, Chester Bowles, Administrator of the Office of Price Administration, Cecelia P. Gallagher and Franz Wagner, officers and employees of said office at Portland, Oregon, all of whom are charged with the enforcement of said orders and regulations.

Wherefore, the respondents pray that said application be dismissed and that they be relieved from compliance with the demands therein made and in said order to show cause, and that they have their costs and disbursements herein.

(Signed) B. G. SKULASON

(Signed) WILBER HENDERSON

Attorneys for Respondents.

[Endorsed]: Filed Oct. 2, 1944. [8]

EXHIBIT "A"

Office of Price Administration
San Francisco Regional Office
Region VIII

Order No. G-93 Under Section 1499.18(c), as Amended, of the General Maximum Price Regulation.

CUSTOM DRESSING OF TURKEYS

For the reasons set forth in an opinion issued simultaneously herewith and under the authority vested in the Regional Administrator of the Office of Price Administration by Section 1499.18(c) of the General Maximum Price Regulation, it is hereby ordered:

(a) The adjusted maximum price for the service of custom processing of live turkeys in Region VIII shall be as follows:

Type of Service	Hens	Toms
Kill and haul	\$.30 per head	\$.35 per head
Loose	.035 per lb.	.03 per lb.
Boxed	.045 per lb.	.04 per lb.

(b) Definitions:

(1) The service of custom processing of turkeys "boxed" means the service of assembling, killing, bleeding, plucking, chilling, grading, head wrapping, and boxing.

(2) The service of custom processing of turkeys "loose" shall be as defined in (1) above except boxing.

(3) The service of custom processing of turkeys "kill and haul" shall be as defined in (1) above except chilling, grading and boxing.

(4) "Region VIII" means the States of California, Washington, Nevada, Oregon, except Malheur County, and Arizona, except those portions of Coconino County and Mohave County lying north of the Colorado River, and the following Counties in the State of Idaho: Benewah, Bonner, Boundary, Clearwater, Idaho, Kootenai, Latah, Lewis, Nez Perce and Shoshone.

(c) This order may be revoked, amended or corrected at any time,

(1) This order shall become effective May 2, 1944.

(56 Stat. 23,765; Pub. Law 151, 78th Cong.; E. O. 9250, 7 F. R. 7871 and E. O. 9328, 8 F. R. 4681)

Issued this 2nd day of May, 1944.

(s) L. F. GENTNER

Regional Administrator [9]

EXHIBIT "B"

Office of Price Administration
Bedell Building
Portland 4, Oregon

CUSTOM DRESSING OF TURKEYS

By Regional Order No. G-93 under Section 1439.18(c) of the General Maximum Price Regulation, the maximum prices for the service of custom

processing of live turkeys in Region VIII have been adjusted as follows:

(a) Ceilings:

Type of Service	Hens	Toms
Kill and haul	\$.30 per head	\$.35 per head
Loose	.035 per lb.	.03 per lb.
Boxed	.045 per lb.	.04 per lb.

(b) Definitions:

(1) The service of custom processing of turkeys "boxed" means the service of assembling, killing, bleeding, plucking, chilling, grading, head wrapping, and boxing.

(2) The service of custom processing of turkeys "loose" shall be as defined in (1) above except boxing.

(3) The service of custom processing of turkeys "kill and haul" means assembling, killing, bleeding and plucking. (This charge should be applied by dealers who do not have the proper facilities for chilling, grading, head wrapping and boxing.)

(4) "Region VIII" means the States of Washington and Oregon except Malheur County.

(c) Interpretation:

(1) The charges set forth in paragraph (a) are to be based on dressed weight. They are not cumulative, i.e. the kill and haul charge may not be applied in addition to the loose or boxed charge. It is not necessary for a processor to subtract anything from his charge if the grower performs the hauling service, i.e. the full kill and haul reduction may be taken.

(2) The above prices are the only prices which may be charged for processing services. Any charge of less than the prices fixed in this Order will be considered an attempt to evade Revised Maximum Price Regulation 269. Charges of more than those prices would be in outright violation of this Order.

Due and legal service of the foregoing, by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 2nd day of Oct., 1944.

/s/ CECELIA P. GALLAGHER

Attorney for Applicant [10]

[Title of District Court and Cause.]

ANSWER

Come Now the respondents and for their answer to the application herein for an order requiring the respondents to permit inspection and copying of records therein mentioned allege:

I.

The respondents admit paragraphs I, II, and III of the application.

II.

As to paragraph IV thereof, the respondents admit that an oral request was made by certain employees of the Office of Price Administration on or about the 1st day of August 1944, for permission to inspect and copy the respondents' records of the

purchase, sales and disbursements above mentioned and that such records were under the control of the respondents at that time. But the respondents deny that they, or either of them, refused to permit such inspection, and allege that they asked for time to consult their attorneys in Washington, D. C. and their local attorney as to whether or not they were legally compellable to comply with said request, the same being based, as the respondents understood and believed, and still understand and believe, on order G-93 (F. R. 9-5287), which the respondents believed, and still [11] believe, to be void, for the reasons specified *infra*. As to the other allegations in said paragraph the respondents deny that they have any knowledge or information sufficient to form a belief regarding the same.

III.

The respondents admit the allegations of paragraph V of the application, except the one relating to the alleged refusal of the respondents to permit the inspection in question, and as to that they reallege the explanation relating thereto set forth *supra* as to paragraph IV.

IV.

The respondents admit that the records in question are in their possession, but they deny the other allegations of paragraph IV.

And as and for a further and separate answer and defense to said application the respondents allege and show to the court the following facts:

I.

For the period of about twelve years last past, the respondent corporation has been engaged, at Portland, Oregon, in the business of wholesaler, processor and purchaser of turkeys, and the respondent, C. W. Norton, has been the manager of said corporation in that business. During that period the growing, processing and marketing of turkeys in the States of Oregon and Washington has been, and it still is, one of the major industries of those states. The respondent corporation handles upwards of one-third of said business in the State of Oregon, and for some time past has been selling to the government almost its entire quantity of turkeys processed by it. [12]

II.

During all of said period it has been the custom of the wholesalers, processors and purchasers of turkeys in those states to haul and pick turkeys for the growers on a per head basis, provided that they subsequently purchased the dressed turkeys; and during the latter part of that period the charge made by them for picking hens was 20c per head and for picking toms 22c per head, plus 3c per head for hauling, making a total charge for picking and hauling of 23c for hens and 25c for toms.

III.

During the year 1943 a majority of said wholesalers, processors and purchasers of turkeys advanced this service charge to 25c per head on hens and 28c per head on toms. The Office of Price

Administration charged that this was a violation of the Emergency Price Control Act of 1942 and amendments thereof and ruled that said service charge be reduced to the former figures of 23c on hens and 25c on toms.

IV.

In the month of November, 1943, the Office of Price Administration issued a ruling to the effect that the processor-wholesaler was prohibited from purchasing dressed turkeys from the growers, although this had been the uniform custom in the above mentioned states for many years theretofore; in other words, that he could not pay the ceiling price fixed by the Office of Price Administration on dressed turkeys and charge the growers for the service of picking and hauling them, which ruling ignored and disrupted the customary practice in said states which had obtained for the above mentioned period.

V.

Later in the month of November, 1943, the above ruling was changed to the effect that processors who had dressed [13] turkeys for farmers might continue to buy the turkeys on a dressed basis, provided they did not exceed the ceiling price of dressed turkeys. This ruling somewhat clarified the confusion brought about by the above mentioned regulations and the respondents and others in the same business believed that they would be able to carry on the business of handling turkeys in the customary manner and they continued to conform

their business practices to said rulings in accordance with their best understanding.

VI.

On the 2nd day of May, 1944, said order G-93 (F. R. 9-5287) was issued by the Regional Administrator of the Office of Price Administration, at San Francisco, by the terms of which the maximum price for the service of custom processing all live turkeys in Region VIII (the States of California, Washington, Nevada, Oregon, except Malheur County and certain portions of the State of Arizona and certain portions of the State of Idaho) was adjusted as follows:

Type of Service	Hens	Toms
Kill and haul	\$.30 per head	\$.35 per head
Loose	.035 per lb.	.03 per lb.
Boxed	.045 per lb.	.04 per lb.

Certain definitions were included in said order, among them one to the effect that the service of custom processing of turkeys "loose" meant the assembling, killing, bleeding, plucking, chilling, grading and head wrapping. A copy of said order is hereto annexed marked Exhibit "A" and hereby made part of this return.

VII.

Simultaneously with the issuance of the last mentioned order the Office of Price Administration, through its officers and employees in Portland, Oregon, issued an order, [14] effective May 8, 1944,

wherein the above mentioned portions of order G-93 were repeated and certain interpretations added to the effect, among others, that the kill and haul charge might not be applied in addition to the loose or boxed charge; and that the above mentioned prices for said service were the only prices which might be charged therefor, that any charge of less than said prices would be considered an attempt to evade said price regulations and that any charges of more than those prices would be a violation of said order. A copy of the last mentioned order is hereto attached marked Exhibit "B" and hereby made part of this return. Said order applied only to the States of Washington and Oregon, except Malheur County in the latter state.

VIII.

In their said business the respondents, as wholesalers, processors and dealers handle "loose" and "boxed" turkeys. The average weight of turkeys so handled by them is such that under the terms of said orders the service charge would amount to approximately 52½¢ per head for hens and 72¢ per head for toms. Such a charge is excessive, the growers will not submit thereto and, as a consequence, the respondents' said business will be ruined if they are compelled to submit to the said regulations.

IX.

The respondents have filed in said court, and there is now pending, a suit No. Civ. 2575 in which said corporation, as plaintiff, prays for a declara-

tory judgment regarding the validity of said orders and regulations against the defendants therein, Chester Bowles, Administrator of the Office of Price Administration, Cecelia P. Gallagher and Franz Wagner, officers and employees of said office at Portland, Oregon, all of whom are charged with the enforcement of said orders and regulations. [15]

X.

On October 2, 1944, there was issued from the Office of Price Administration at Washington a regulation to the effect that persons in the position of the respondents as regards the handling of poultry, might act as agents for the growers of poultry in sales thereof to the government and might divide with the growers, subject to certain restrictions, the premiums on such sales.

XI.

The respondent corporation at once entered into contracts with its growers and complied with said order G-93 as thus in effect modified and continues to comply therewith.

XII.

Previous thereto the respondents had not complied with said order G-93 for the reason that they could not do so without jeopardizing their said business.

XIII.

As a result of said modification of order G-93 no reason remains for the application herein for the examination of the books, records and accounts of the respondents, unless the applicant is seeking evi-

dence to be used as a basis for a complaint in an action for damages against the respondents for an alleged violation of the Emergency Price Control Act and regulations thereunder or as a basis for a criminal prosecution of the respondents for such alleged violations.

XIV.

The respondents are possessed of large means and are amply able to respond in damages should any be assessed against them in a suit or action in any court.

XV.

The respondents are citizens of the United States.

[16]

XVI.

Said orders and regulations, Exhibits "A" and "B" are unlawful and void for the following reasons:

(a) Their enforcement would cause a radical change in the business practices, cost practices and methods established in said industry in said locality and followed by the respondents and others in that business for a long period of time before the enactment of the Emergency Price Control Act.

(b) Said orders are not authorized by the Emergency Price Control Act, or by any amendments thereof, or by any other law. They are not maximum price regulations, but, on the contrary, an attempt is thereby made to fix arbitrary and inflexible prices for the processing services therein mentioned.

(c) Said orders and regulations are unfair and

discriminatory in that they do not purport to be of general application, restricted as they are to the State of Washington and the State of Oregon, except Malheur County; and do not purport to apply to all persons or corporations engaged in said business within that area, such as co-operatives, which are permitted to rebate to their members, growers of turkeys, any overcharge resulting from compliance with such processing regulations, while independent wholesalers, processors and dealers, such as the respondents, are prohibited from so doing by the express language of exhibit "B". Said orders are unjust and unlawful and their enforcement would inevitably result in the denial of the respondents of the equal protection of the laws and would deprive them of their property without due process of law and without just compensation. By the issuance of said orders an attempt is made to deprive the respondents of the protection against self-incrimination. The respondents hereby invoke and rely upon all their Constitutional rights, [17] privileges and immunities applicable to the issues involved in this proceeding.

Wherefore, the respondents pray that said application be dismissed, that said orders be declared unlawful and void and that the respondents be discharged from further compliance with the order to show cause herein, and that they have their costs and disbursements.

/s/ B. G. SKULASON

/s/ WILBER HENDERSON

[Endorsed]: Filed Oct. 27, 1944. [18]

EXHIBIT "A"

Office of Price Administration
San Francisco Regional Office
Region VIII

Order No. G-93, Under Section 1499.18(c), as Amended, of the General Maximum Price Regulation.

CUSTOM DRESSING OF TURKEYS

For the reasons set forth in an opinion issued simultaneously herewith and under the authority vested in the Regional Administrator of the Office of Price Administration by Section 1499.18(c) of the General Maximum Price Regulation, it is hereby ordered:

(a) The adjusted maximum price for the service of custom processing of live turkeys in Region VIII shall be as follows:

Type of Service	Hens	Toms
Kill and haul	\$.30 per head	\$.35 per head
Loose	.035 per lb.	.03 per lb.
Boxed	.045 per lb.	.04 per lb.

(b) Definitions:

(1) The service of custom processing of turkeys "boxed" means the service of assembling, killing, bleeding, plucking, chilling, grading, head wrapping, and boxing.

(2) The service of custom processing of turkeys "loose" shall be as defined in (1) above except boxing.

(2) The service of custom dressing of turnouts "full and hot" shall be as defined in (1) above except drilling, greasing and waxing.

(3) "Region VIII" means the States of California, Washington, Nevada, Oregon, except Multnomah County, and Arizona, except those portions of Coconino County and Mohave County lying north of the Colorado River, and the following Counties in the State of Idaho: Benewah, Bonner, Boundary, Clearwater, Blaine, Losthead, Latah, Lewis, Nez Perce and Shoshone.

(4) This order may be amended, amended or suspended at any time.

(5) This order shall become effective May 2, 1944.

(6) See Stat. R. 375; Pub. Law 151, 75th Cong.; E. O. 9559, 1 P. R. 1571 and E. O. 9529, 3 P. R. 4987.

Dated this 2nd day of May, 1944

L. F. GENTNER

Regional Administrator. [19]

EXHIBIT - B

Office of Price Administration
Federal Building
Portland 4, Oregon

CUSTOM DRESSING OF TURNOUTS

By Regional Order No. G-81 under Section 1489(a) of the General Maximum Price Regulation, the maximum prices for the service of custom

processing of live turkeys in Region VIII have been adjusted as follows:

(a) Ceilings:

Type of Service	Hens	Toms
Kill and haul	\$.30 per head	\$.35 per head
Loose	.035 per lb.	.03 per lb.
Boxed	.045 per lb.	.04 per lb.

(b) Definitions:

(1) The service of custom processing of turkeys "boxed" means the service of assembling, killing, bleeding, plucking, chilling, grading, head wrapping, and boxing.

(2) The service of custom processing of turkeys "loose" shall be as defined in (1) above except boxing.

(3) The service of custom processing of turkeys "kill and haul" means assembling, killing, bleeding and plucking. (This charge should be applied by dealers who do not have the proper facilities for chilling, grading, head wrapping and boxing.)

(4) "Region VIII" means the States of Washington and Oregon except Malheur County.

(c) Interpretation:

(1) The charges set forth in paragraph (a) are to be based on dressed weight. They are not cumulative, i.e. the kill and haul charge may not be applied in addition to the loose or boxed charge. It is not necessary for a processor to subtract anything from his charge if the grower performs the hauling service, i.e. the full kill and haul reduction may be taken.

(2) The above prices are the only prices which

may be charged for processing services. Any charge of less than the prices fixed in this Order will be considered an attempt to evade Revised Maximum Price Regulation 269. Charges of more than those prices would be in outright violation of this Order.

Due and legal service of the foregoing, by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 23rd day of October, 1944.

F. E. WAGNER

Attorney for Applicant. [20]

[Title of District Court and Cause.]

ORDER OF DISMISSAL

On this 2nd day of December, 1944, this cause comes on to be heard before the Court for final disposition herein, and the Court being advised in the premises and having heard and considered testimony in the companion Cause Number Civil 2575, Northwest Poultry & Dairy Products Company, etc., vs. Chester Bowles, Administrator, Office of Price Administration, and it appearing to the Court that all of the information that is required herein was disclosed by defendant and its counsel during the trial of the said other case; whereupon,

It Is Ordered that the application requiring the respondent to permit inspection of inventory and records herein be, and the same is hereby, denied, and,

It is Further Ordered that the above cause be, and the same is hereby dismissed. Costs to neither party.

Dated at Portland, Oregon. this 2nd day of December, 1944.

/s/ CLAUDE McCOLLOCH
Judge

[Endorsed]: Filed Dec. 2, 1944. [21]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Northwest Poultry and Dairy Products Company, an Oregon Corporation, and C. W. Norton, President, and to B. G. Skulason and to Wilber Henderson, its attorneys.

Notice is hereby given that Chester Bowles, Administrator, Office of Price Administration, applicant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that certain judgment dismissing said action, made and entered in the above entitled action on the 2nd day of December, 1944.

Dated at Portland, Oregon this 27th day of February, 1945.

/s/ F. E. WAGNER

/s/ W. DUNLAP CANNON, JR.

Attorneys for Appellant Chester Bowles, Administrator

[Endorsed]: Filed Feb. 27, 1945. [22]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Comes now the plaintiff above named and as appellant in the above entitled action submits the following as his Designation of Record on the appeal of said matter to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Order to Show Cause
2. Return to Order to Show Cause
3. Answer
4. Order of Dismissal
5. Transcripts of Hearings on October 6, and October 2, 1944 on Motion for Order to Show Cause
6. Notice of Appeal
7. This Designation

Dated at Portland, Oregon, this 23rd day of March, 1945.

/s/ F. E. WAGNER

Of Attorneys for Appellant

[23]

State of Oregon,
County of Multnomah—ss.

Due service of the foregoing Designation of Record is hereby accepted in Portland, Multnomah County, Oregon, this 23rd day of March, 1945, by receiving a duly certified copy thereof.

/s/ B. G. SKULASON

Of Attorneys for Defendants

[Endorsed]: Filed March 23, 1945. [24]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,

District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 25 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 2565, in which Chester Bowles, Administrator, Office of Price Administration is plainff and appellant, and Northwest Poultry and Dairy Products Company, an Oregon corporation, and C. W. Norton, President, are defendants and appellees; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation, as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed a duplicate transcript of the testimony taken in this cause.

In Testimony Whereof, I have hereunto set my

hand and affixed the seal of said Court in Portland,
in said District, this 28th day of March, 1945.

[Seal]

LOWELL MUNDORFF,

Clerk

By F. L. BUCK

Chief Deputy Clerk [25]

In the District Court of the United States
for the District of Oregon

Civil No. 2565

CHESTER BOWLES, Administrator of the
Office of Price Administration,

Applicant,

vs.

NORTHWEST POULTRY AND DAIRY PROD-
UCTS COMPANY, an Oregon corporation,
and C. W. NORTON, President,

Respondents.

Portland, Oregon, Monday, October 2, 1944.

10:42 o'clock A. M.

Before:

Honorable Claude McColloch, Judge.

Appearances:

Miss Cecelia P. Gallagher, Enforcement Attor-
ney, Office of Price Administration, Portland
District, appearing for the Applicant.

Mr. Bardi G. Skulason, Attorney for the Re-
spondents.

PROCEEDINGS

The Court: Now let me hear Mr. Skulason and I will come back to your case.

Miss Gallagher: All right.

Mr. Skulason: If your Honor please, this comes up on an order [1*] to show cause, as your Honor knows, by the Northwest Poultry and Dairy Products Company, Civil No. 2565, and I have served a return on Miss Gallagher and filed the original this morning, and to state the matter briefly and in such form as I believe the Court can understand, I will say that the application is for an order authorizing the examination of certain records of my client of sales, purchases and disbursements concerning the processing and selling and marketing of turkeys between May 8th and August 10th. The application is made under a certain order issued from the Regional Office in San Francisco on May 2nd last, purporting to fix certain prices for the service, and the reason that we are resisting the application for the examination of the records is that we contend that this order is invalid, on two principal grounds:

First, that contrary to the Emergency Price Control Act in 1942 it disregards the custom prevailing in that industry for a long period of time before the enactment of that law, and of course before the issuance of this regulation. That is the first point.

The second point is—and perhaps there are three; yes—that the order is unauthorized by the Act;

*Page numbering appearing at top of page of original certified Transcript.

that it isn't a maximum price control regulation or order, but fixes an inflexible, arbitrary price for the service, and such that it amounts to a confiscation of the property of the respondents here.

I think, your Honor, I will have to go into details to [2] make myself understood by the Court.

The Northwest Poultry and Dairy Products Company is engaged, and has been engaged for about twelve years, in the processing and in the purchasing and marketing of turkeys. It is now under contract with the Government for the delivery of, I think, its entire product for the use of the military forces.

The Court: I don't think I need to keep Mr. Lenske here. What is the number of your Companion case, Mr. Lenske, the principal case? 2564 is your supplemental proceeding.

(Discussion here ensued pertaining to another case, after which proceedings herein were resumed at 10:47 o'clock A. M. as follows:)

Mr. Skulason: I stated to the Court that my client for some time has been furnishing practically all of its products, its turkeys, to the Government for the military forces, and that it amounts to a very large sum of money per year. The amount is not stated here but my information is that it runs into millions.

The Court: Whose business? Your client's business?

Mr. Skulason: Yes. That is the gross business,

I guess, but they have a very large business in turkeys. Now so that this may be placed in clear perspective, if I may——

The Court: How does jurisdiction happen to be here? Don't they operate elsewhere through the Northwest?

Miss Gallagher: Their operation I think is entirely within the State of Oregon, your Honor. [3]

Mr. Skulason: Yes, practically so. I don't think there is any question about jurisdiction. I admitted these matters in the application as to jurisdiction and authority to proceed here, provided the orders under which they are proceeding are valid.

The Court: This is your home office in Portland?

Mr. Skulason: Yes, your Honor. Now they say that for a period of the last eleven years or so the respondent corporation has been engaged in this business in Portland, and the other respondent, Mr. Norton, has been its manager; and then it is stated that during all of that period it has been the custom of wholesalers, processors and purchasers of turkeys to haul and pick turkeys for the growers on a per head basis, provided they later purchased the turkeys, and that until 1943 that charge was 20 cents per head for picking—there is some error here. Anyhow, it amounted, with the haul, to 23 cents per head for hens and 25 cents for toms, and it is important to keep those figures in mind, 23 and 25, and no regulation on a per pound basis. That becomes quite relevant here, I believe.

Then in 1943 these respondents and the majority of other wholesalers and processors in the business in Oregon and in Washington advanced this price to 25 cents per head for hens and 28 cents per head for toms.

Then in November, 1943, the Office of Price Administration issued a rule prohibiting this charge, prohibiting the processor, wholesaler, from purchasing dressed turkeys from the growers, [4] and the net result of that was that the price was put back to where it had been before.

Then on the 2nd of May of this year Order G-93 was issued from the Regional Office of San Francisco and that brought in something entirely different. It was stated therein that it was a maximum price regulation, so stated in the introduction to the order, and the kill and haul prices were fixed at 30 cents per head and 35 cents per head, respectively, but loose turkeys were put on a per pound basis of 3-1/2 cents for hens and 3 cents for toms, and boxed turkeys were put also on a per pound basis.

Now then, there were certain definitions attached to this order as to what constituted loose and boxed turkeys, and so forth, with the net result, as claimed in this return, that upon the average weight of turkeys in this locality the cost of processing was advanced from 52-1/2 cents for hens and 72 cents for toms, a jump from the pick and haul of 30 and 35 cents, or thereabouts, and my client says that they can't do business on that basis: they can't get the

turkeys from the growers. The growers won't sell them to them if they have to stand that heavy charge of processing. They can do business on the basis they are doing business on now, of the one fixed by the Price Administrator, of 30 and 35 cents per head, whatever it is, and the great objection, your Honor—and it is not only the objection by my client here but there has been a convention held here of some seventy-five representatives in this business in Washington and Oregon; the [5] matter has been taken up back and forth by wire and telephone with Washington, and there have been numerous conferences about it, and it is claimed everywhere by those in the business that my client is in that this order is unlawful and confiscatory and violates constitutional rights.

Now the practical result here, which we will show if any evidence is taken in this case, is that——

The Court: Well, you haven't been sued yet, have you?

Mr. Skulason: We have been required to come in here to respond to this order to show cause.

The Court: This is for discovery only.

Mr. Skulason: Yes.

The Court: You haven't been sued yet?

Mr. Skulason: No, but we have sued.

The Court: Oh.

Mr. Skulason: We have brought a suit.

The Court: To restrain?

Mr. Skulason: Yes. That is a part of our return. I will come to this afterwhile. Getting to this

practical situation, that is why I am obliged to ask the Court for an early hearing of the matter and an early disposition of it. The growers are refusing to sell turkeys to my clients on this basis.

The Court: This is the turkey season?

Mr. Skulason: This is the turkey season, and the Government is demanding the turkeys so they may be in the hands and in the use [6] of the military service at the proper time, and it is really very acute.

Now we also claim this order is void because it is practically purely local. It is not of general application. They started out with defining Region 8 as California, Washington, Oregon, and Idaho and Nevada, and parts of Arizona, and then they cut that down to Washington and Oregon except the County of Malheur.

We also claim it is void because it is discriminatory, in that we are compelled to make this charge, while the cooperatives who are in the same business, if they make the same charge are permitted to return by way of dividends to their members the excess in this charge and we are not permitted to do it.

Now let's look at this order. Let us look at this order, your Honor. It is attached as an exhibit to the return.

The Court: Will you step over there with Mr. Skulason and check your file with all the copies he has. All that I have is the Government's application.

Mr. Skulason: I just filed the return this morning, your Honor.

The Court: All right. It hasn't come in to you yet?

The Clerk: No, it has not come in.

The Court: When did you bring your original proceeding, the complaint?

Mr. Skulason: I brought that Friday afternoon.

The Court: Friday afternoon? [7]

Mr. Skulason: Yes.

The Court: Can you get those, too. It is a new case he brought against the Government Friday afternoon.

Mr. Skulason: A new case. That is the case of Northwest Poultry Company against Bowles.

The Clerk: Yes.

Mr. Skulason: Now, your Honor, look at these orders. Those regulations give a headache I think not only to the people in the position of my clients but to the lawyers who are called in to interpret them and try to understand them. They started with Order G-93 and they say that under section so and so, "The adjust maximum price for the service of custom processing of live turkeys in Region VIII shall be as follows:" then comes this kill and haul, 30, 35, and loose 3-1/2 and 3 cents a pound.

Now Region VIII they say comprises those states I mentioned.

Now it might have been possible to work under that order if there hadn't come with it at the same time this Exhibit B, which copies the items, the portion as to what the charges may be and then adds this as an interpretation:

“(2) The above prices are the only prices”—they underscore the word “only” — “which may be charged for processing services. Any charge of less than the prices fixed in this Order will be considered an attempt to evade Revised Maximum Price Regulation 269. Charges of more than those prices would be in [8] outright violation of this Order.”

In other words, as I understand that language, it is not the maximum regulation only; it is an absolute fixed price, and I find nothing, as far as I have read this Act, authorizing the issuance of any such order. The Act is a maximum price regulation, and I suggest to the Court that they had no right to fix a definite invariable, unchangeable price.

Now we have set forth the various reasons why we claim that this order is void. Then we have said that we have commenced a suit against the Administrator and against my worthy colleague here and Franz Wagner, who are charged with the execution and enforcement of these orders, and we brought that under Section 2(m), which confers jurisdiction on this Court regardless of the amount involved in cases apparently such as these, where it is claimed by the citizen or the man in the trade that the regulation is unauthorized and void.

The Court: Well, is that under the amendment to the statute?

Mr. Skulason: It is under 2(m), the amendment. Yes, it is a recent amendment. Now I filed the complaint and service——

The Court: You could not sue prior to the last Congress in this Court.

Mr. Skulason: No. This is a late amendment.

The Court: Any question about that, Miss Gallagher?

Miss Gallagher: Yes, there is, your Honor.

The Court: There is a question: [9]

Mr. Skulason: Yes.

The Court: All right. Proceed. I will hear her after you.

Mr. Skulason: Now just how we are going to get jurisdiction of Chester Bowles, perhaps we can't serve him here; perhaps you will be authorized to appear for him; I don't know.

The Court: Don't overlook Miss Gallagher has just said she questions your right to bring the suit at all. We will hear her later.

Mr. Skulason: Yes. Certainly. I want to explain what we have done. There is a question there whether we have a right to bring it at all, of course, but to bring it under this amendment, which says, I think, in cases like this a suit may be brought for declaratory relief in the District Court of the locality where the people reside, where the regulations are operated, and the amount involved is dispensed with.

The Court: Apparently she is going to dispute that.

Mr. Skulason: All right. I think perhaps she will. I think there is some ground for that argument, that it perhaps cannot be done, but I am

acting, your Honor, with the advice of Mr. Diggs, of Washington, D. C., who has been the attorney for my client and claims to be an expert in these OPA matters, which I certainly disclaim to be, and it is his opinion that the court has jurisdiction and that this suit is properly to be brought.

Now before I stop—we will leave that right there—as bearing upon this matter, the practical matter here of getting [10] the turkeys into the trade, into proper channels, I have evidence here in writing, your Honor, to the effect that a representative of the office here has been going around to the growers, to the farmers from whom my client buys the turkeys, and has threatened them with dire consequences if they continue to sell to my client, and it seems extraordinary, but here is the writing signed by two people on the 24th of September, in which Mr. Rodeback, I think connected with the Office, went to several of these people, according to this writing, and said that Mr. Norton was not an honest man, they should not deal with him; that he was a crook, a rebel and a cheat, and that he is trying to monopolize the turkey business, and various other things of this sort, which to me are extraordinary, but there is the writing anyhow. That is partly the basis for my allegation that they are threatening to invoke the sanctions and penalties of the Act, and that we have no remedy and we are properly here in equity for a declaratory judgment as to what these orders mean and whether or not we must comply with them. And the very last thing this morning before I left the office

Mr. Norton called me and urged upon me the importance of an early disposition of this whole matter. I don't know. I have just told your Honor how the matters stand.

The Court: Did you draw the complaint or did the lawyers, your associates in Washington?

Mr. Skulason: I drew the complaint myself. I take full responsibility, and he is really not associated. I have been going on his opinions—on his letters. [11]

The Court: Miss Gallagher.

Miss Gallagher: I don't know whether to start first or to start last, your Honor. I am of the opinion that Mr. Skulason has the cart before the horse. The real purpose of our petition is whether or not we may have an order from your Honor to go into the offices of the Northwest Poultry Company and make an inspection and copy of their records. The Act itself, and as it originally was amended under Section 202 (a), (b) and (e), provide that the Administrator may require the copying of records—may require the inspection and the copying of records, and that upon a refusal on the part of any person—"In case of contumacy by, or refusal to obey a subpoena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the

court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of Section 4 (a)."

Subsection (b) refers to the requirement that, "The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, to furnish any such information under oath or [12] affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories", and so forth, to make it quite clear that our authority to come in to your Honor and ask for this requirement, order, applies not only to subpoenas but also to an inspection of records and a copying of records.

We agree with Mr. Skulason that it is very important in this situation. The turkey season is at hand. Way back in May, shortly after the issuance of G-93, the order referred to, we had some considerable discussion with Mr. Norton as to the effects of the order. Since, and during that early spring season, which is called the breeder season, we received a number of complaints that Mr. Norton was not following out the requirements of G-93.

Early this August, on the 1st day of August, before the opening of the fall season of the turkeys,

in order to do what we could to get things straight, running smoothly before the turkeys began coming in, and upon the receipt of still more complaints that Mr. Norton was not deducting the full amount required to be deducted under G-93, we went to Mr. Norton—Mr. Rodeback did; Mr. Rodeback is an investigation in our office, who is present in court today—and asked Mr. Norton if he might take a look at his records and make a copy of them. Our relationship with Mr. Norton in the past has always been a most friendly one. We have had a great many differences of opinion with him, but there [13] has been no animosity between us, and at that time we made our request formally and yet without writing. Mr. Norton said then, “I will tell you anything I want you to know but I don’t want you to look at our records, and I don’t want you to copy them.” He told us then, and has told us since, he wasn’t following the requirements of the Order G-93. However, we didn’t feel it was a good way to try a lawsuit to come into court here and ask for an injunction against Mr. Norton and base our whole case upon his statement to us that he had been charging only 30 and 35 cents as against the higher price we maintain he was required to charge. Therefore we wanted to inspect his records to find out from whom he was purchasing and to find out what he was paying, to get some documentary evidence to back up our request for an injunction.

After the August 1st request was made, on August 3rd Mr. Rodeback went back to him and again

talked to him, without again presenting any requirement in writing to him. On that date he said he would like to talk to his lawyers, both in Portland and in Washington, D. C. He said, "I am not refusing you these records but I don't want you to see them yet, until I have had the advice of my attorney." Mr. Rodeback came back and asked me about it. I said, "Let him talk to his attorney."

In the meantime I had talked with Mr. Norton on the telephone. Mr. Norton at ten o'clock the next day hadn't talked to his attorney in Washington. At 11:45 Mr. Meinke called, saying that they had talked to their attorney in Washington; that some [14] memo was being sent by Washington OPA to Portland OPA, and could we wait until the 7th or 8th of August to ask for our inspection?

We did wait until August 14th, and in the meantime we had consistently met with the failure to allow us to inspect and to copy.

On August 14th we served on Mr. Norton an original inspection requirement, signed in person by Chester Bowles, and at that time met again a refusal either to allow the inspection or the copying. At one time he said, "You may look at them but you may not copy them." The records are long and voluminous. It would be impossible for an investigator or an attorney to look at them and carry away in his mind sufficient facts upon which to conduct any further investigation. And since August 14th, even since the filing of this petition for an order, I have talked to Mr. Norton. In each instance he

has said, "No, I will not allow you to copy our records."

That is our story on the request to inspect records. We have had Mr. Norton's admissions. We have had a number of complaints, which have led us to the conclusion Mr. Norton is in violation of Order G-93, and probably of Maximum Price Regulation 269, but we have not wanted to file our injunction suit, or any other kind of a suit against Mr. Norton without further information. In order to get that information we request an order from your Honor allowing us to go in and inspect and copy his records.

That is our story on our original petition, your Honor. [15]

The Court: Now you have been sued, to be enjoined?

Miss Gallagher: Yes. I have not yet been served with those papers. I suppose I shall be.

The Court: Well, I want to hear you, though, to the extent you are prepared, on Mr. Skulason's points.

Miss Gallagher: Now so far as Mr. Skulason's showing in his return to the order, I would be constrained to say, as an answer to our request, that the material alleged therein is immaterial, on the ground particularly that this Court does not have jurisdiction to pass upon the validity of an order or a regulation.

The Court: Now argue that.

Miss Gallagher: Well, we start with—there are a long series of cases, your Honor.

The Court: What does that amendment passed this spring provide?

Miss Gallagher: It is my contention that it does not provide—that it does have nothing to do with this kind of a proceeding. Do you have a copy of that?

Mr. Skulason: Yes (passing paper to Miss Gallagher).

Miss Gallagher: I will tell you in our words first, your Honor, what we think it means. Formerly, before the amendment of the Act, a number of rationing regulations issued under the Second War Powers Act carried within them a provision that rationed foods, foods rationed under this order, shall not be sold at over the ceiling prices provided for in other maximum price regulations. Under those provisions of the regulations the Office of Price [16] Administration on a great number of occasions brought what we call suspension order proceedings, an administrative proceeding, against people who were selling rationed foods at over ceiling prices. It was what we call a cross-sanction, or what was called a cross-sanction, and there was a good deal of complaint against that, and Section 2(m) provided that no more cross-sanctions may be put into the regulations; no further ration regulations may require that the rationed goods be sold only at ceiling prices, and that is why Section 2(m) was put into the regulation.

The Court: You mean into the statute?

Miss Gallagher: Into the statute; yes, your Honor.

The Court: That is all it says?

Miss Gallagher: I will be glad to read it to your Honor. That is what we say it says.

The Court: I understood as general information that Congress had given jurisdiction to District Courts to contest the validity of regulations, which was denied by the language of the original Act. Am I wrong about that?

Miss Gallagher: I think that is not correct. Section 2 (m) says that there shall be no cross-sanctions. The Congress in its Senate Report used this for an illustration: A farmer who had refused to comply with the directives of the War Foods Administration was denied the use of gasoline under the gasoline regulation and the Congress has said in its Senate Report that is the sort of thing it wants to avoid. We think in amended regulations to [17] that extent that they also want to provide against prohibiting price violations in the ration regulations.

The Court: Is 2 (m) very long?

Miss Gallagher: No, it is not.

The Court: Will you read it?

Miss Gallagher: "No agency, department, officer, or employee of the Government, in the payment of sums authorized by this or other Acts of Congress relating to the production or sale of agricultural commodities, or in contracts for the purchase of any such commodities by the Government or any department or agency thereof, or in any allocation of materials or facilities, or in fixing quotas for the production or sale of any such commodities, shall

impose any conditions or penalties not authorized by the provisions of the Act or Acts, or lawful regulations issued thereunder, under which such sums are authorized, such contracts are made, materials and facilities allocated, or quotas for the production or sale of any such commodities are imposed."

That is the part I have been discussing, where cross-sanctions have been eliminated. This is the part Mr. Skulason referred to.

"Any person aggrieved by any action of any agency, department, officer, or employee of the Government contrary to the provisions hereof, or by the failure to act of any such agency, department, officer, or employee, may petition the district court of the district in which he resides or his place of business for [18] any order or a declaratory judgment to determine whether any such action or failure to act is in conformity with the provisions hereof and otherwise lawful; and the court shall have jurisdiction to grant appropriate relief. The provisions of the Judicial Code as to monetary amount involved necessary to give jurisdiction to a district court shall not be applicable in any such case."

The Court: What happened to the original language in the Act which denied jurisdiction to the District Courts?

Miss Gallagher: It is still in the Act, your Honor. The provisions for testing the validity of a regulation are just as they were, except they have been amplified.

The Court: What section? Was that close to 2 (m)?

Miss Gallagher: No.

The Court: That doesn't matter.

Miss Gallagher: It comes under protests as such.

The Court: It doesn't matter.

Miss Gallagher: It is a whole section by itself. They have amplified that. Originally the Act said within sixty days of the issuance of a regulation any party may appeal to the Administrator for a review of it and then from the Administrator to the Emergency Court of Appeals. The new one is giving longer time and different periods of time in which he may make his protest against the regulation.

The Court: Now Mr. Skulason argued—let me ask you, how did you understand his argument about Order G-93? [19]

Miss Gallagher: Well, I understand he thinks that it is a bad order; that it is an unfair and discriminatory order.

The Court: No, no. Pardon me.

Miss Gallagher: Oh.

The Court: He said it is a price fixing order, not maximum price fixing, and he said the statute does not authorize price fixing.

Miss Gallagher: The order says so much, 30 and 35 cents may be charged for picking and hauling, 2 and 3-1/2 cents for loose dressing, 4 and 4-1/2 cents shall be charged for boxed—dressed and boxed; that pick and haul means only hauling of birds in from the farm, killing them, picking the

feathers off, and that is all. That the deduction for that shall be 30 and 35 cents. If the processor goes further and picks them, head-wraps them, chills them and boxes them, or doesn't box them, he shall charge a higher price; the deductions shall be less than that, on the theory that is his price, his cost for doing that service, and that it should be taken from the producer to repay to the processor the amount it costs him to process the birds in that way. I don't think it is a price fixing order. The interpretation is true. It is said you must charge this much and no less; otherwise you are returnable, but a true cooperative—a cooperative maximum price allowed to the grower for the sale of the dressed bird.

The Court: I see. Now he says it is discriminatory between his client and the cooperative. [20]

Miss Gallagher: The cooperatives are under their past practice. They have always been able to return to their members money that is collected, money for which sales are made over and above the ceiling price. They sell at the ceiling price but the returns they have taken in during the year are returnable, but a true cooperative—a cooperative is pretty carefully defined in Supplemental Order No. 84. That is an advantage to the cooperative; that is true—an advantage which they have themselves built up over years of their own practice, however. A cooperative may not charge less than 30 or 35 cents, but the net return is returnable to the members, and in the end they do receive an

advantage, as all cooperatives under these circumstances do.

The Court: Is your client the largest dealer in turkeys?

Mr. Skulason: My client handles one out of every three turkeys in the State of Oregon, your Honor.

The Court: Who are the other large operators?

Mr. Skulason: I don't know who may be the others. This has been, if I may say so, this has been considered by the operators in Oregon, and Washington as well, and if the Court would permit me to I would like to read certain resolutions which they adopted as to the point as to the extensiveness of this.

The Court: We will have Miss Gallagher finish, then I will hear you.

Mr. Skulason: Yes.

Miss Gallagher: There are a number of other operators in Oregon: [21] Marion Creamery, Washington Creamery, Mr. Martindale—I don't know what he calls his plant; Swift & Company, and Douglas Cooperative, and one or two more.

Mr. Skulason: Mr. Norton is, if not the largest, one of the largest; I think the largest in the state.

Miss Gallagher: In the State of Oregon, yes. This is one thing I should like to urge upon your Honor somewhere along the line, and that is there are other processors in Oregon, and in Portland, who have been following the provisions of Order G-93, whether they like it or not; there is a great deal of protest against the order—I am frank to

state that; but otherwise they have followed the provisions of the order. Mr. Norton has consistently refused to follow the provisions of the order and up until a short time ago the reports coming to us are that Mr. Norton is receiving all the turkeys; the other processors are not. A man just down the street and across the street from Mr. Norton, who, on the 16th day of August, when the new season started and G-93 was put into effect by this Mr. Clark, on that day he ceased getting any turkeys at all. Mr. Norton, we are told—again we don't have the documentary evidence to prove it—has had turkeys up until the middle of last week. Now whether the situation has changed since that time or not I don't know, but up until the 25th of August, at any rate. Since that date I don't know. Mr. Norton now says he will talk to us only in court and we don't get any information from him. [22]

I am not criticizing Mr. Norton personally, because, as I say, we have been friendly all through the matter. It is an extremely serious situation. Mr. Norton is in violation of the requirements and he continues to be in violation. If we can do nothing about it by looking at his records to build up some kind of a case to test out the question whether or not he is in violation, he will continue to gain an advantage over all the other processors who are complying with the regulation, which of course is eminently unfair, and our hands are tied until we can get in and look at his records and get the information on which to bring a case against him;

unless, in the meantime, a change comes in the regulation. That I can't predict.

Mr. Norton's real remedy, in my opinion, is a protest of the regulation to the Emergency Court of Appeals. The way has been open to him all the way along since last May, when it was first issued, and since the quarrel about the thing, the protesting informally about it has begun, to my knowledge there has been no protest made to the Administrator in a formal manner, nor to the Emergency Court of Appeals. That could be done and I think should be done, rather than to argue the question out before your Honor.

I don't know whether you want to hear us on this or not but Mr. Rodeback, our investigator, is in the courtroom and I think he would make a very definite denial of the allegations in the letter referred to by Mr. Skulason. [23]

The Court: He is entitled to deny it if he wants to and if you want to put him on.

Miss Gallagher: If you care to hear him in the matter I will put him on.

The Court: I repeat, he is entitled to make the denial if you want to put him on.

Miss Gallagher: Mr. Rodeback.

The Clerk: Will you state your name, please?

Mr. Rodeback: Donald E. Rodeback.

DONALD E. RODEBACK

was thereupon produced as a witness in behalf of the Applicant and, having been first duly sworn, testified as follows:

Direct Examination

By Miss Gallagher:

Q. Mr. Rodeback, were you present in court to hear the quotations from a letter read by Mr. Skulason?

A. I heard part of the quotation, not all of it.

Q. Did you hear the allegation that you had been out in the territory in the district and had called Mr. Norton certain names and had accused him of certain practices?

A. Yes, I heard that.

Q. Have you ever called Mr. Norton a cheat, or any of the other things they say you have said?

A. I have not. All I ever did was to explain to the grower the [24] interpretation of the regulation as it had been explained to me by our office and that if he was not in compliance with G-93 that he was in effect causing the grower to receive more than the ceiling under 269, and if that fact was proven that the grower would be liable for the amount of the overcharge under 269, as the Administrator would have a treble damage claim thereby.

Miss Gallagher: Thank you. That is all, unless Mr. Skulason wants to talk to you.

Mr. Skulason: May I question him, your Honor?

The Court: Yes.

(Testimony of Donald E. Rodeback.)

Cross Examination

By Mr. Skulason:

Q. Mr. Rodeback, a little bit back—do you know Mr. Leonard W. Spath? A. Yes.

Q. The Spath Hatchery & Poultry Farm, Route 6, Box 757, Portland? A. Yes, I do.

Q. You also know his wife, Martha Spath?

A. Yes, I do.

Q. Did you call on those people on September 24th? A. Yes, sir.

Q. And talk to them about this matter of Mr. Norton and the regulation? A. Yes, sir.

Q. Did you tell him that they should not sell turkeys to Northwest [25] Poultry for the reason that they are not charging enough for hauling and picking? A. No, sir.

Q. Did you tell them that?

A. I didn't tell them that. I told them that they shouldn't sell turkeys to anyone unless the deduction called for under Order G-93 was made; that if they did receive a sum less than the amount called for by G-93 that they would be considered in violation of Maximum Price Regulation 269.

Q. Did you also tell them that they got under-grade and underweight on every load that they sold to Northwest Poultry?

A. No, sir, I didn't. I repeated a statement made to me by another grower, which indicated that that had happened in his case, but I didn't make any specific allegation. I repeated hearsay; nothing more.

(Testimony of Donald E. Rodeback.)

Q. Did you also tell them that if they would sell turkeys to the Columbia Produce they would get honest weight and would not be undergraded?

A. No, sir.

Q. Particularly—— A. I——

Q. How?

A. I didn't say that. I told them that I was aware that Columbia Produce Company, which was directly across the street, had submitted their records to examination and it was found that they had never [26] been in violation of Order G-93 up to the time their records were checked.

Q. Did you also tell them that they should deal with an honest man instead of a crook, a rebel, a cheat, a very dishonest man like Mr. Norton, of the Northwest Poultry?

A. No, sir, I didn't make any such statement.

Q. Did you tell them that Mr. Norton was trying to monopolize all the turkey business?

A. I did say that, in effect, Mr. Norton was— had a monopoly on the turkey business because of his being in violation of G-93, because I had been told by other processors in the state, where competition was direct in the community, that they were not getting turkeys that they had in normal times: that if all competitors are on an equal basis all turkeys are more or less evenly distributed, but the Northwest Poultry & Dairy Products Company has received more turkeys since they have been operating on the basis they have than they normally would have.

(Testimony of Donald E. Rodeback.)

Q. Did you also tell these people that Mr. Norton would keep his skirts very clean, that he would not have to stand any loss from the turkeys he is buying now, "but you poor farmers will, if you sell your turkeys to Northwest Poultry under these conditions, will have to refund to the Government as high as \$1.20 per head on every turkey sold to Northwest Poultry"?

A. I made part of that statement. I didn't refer to the farmer as "poor farmer", and I didn't say that the amount would be \$1.20. [27] I did say that as far as Northwest Poultry & Dairy Products Company were concerned, that the Administrator would not have any cause of action for an overcharge nor an undercharge; that they would have cause to bring an injunction suit only; that if there was any treble damage action it would be against the farmer only.

Q. Did you interview other producers about the same time? A. I saw one other producer.

Q. How many did you talk to? A. One.

Q. Who was that? A. Mr. Smith.

Q. Yes. Is his wife's name Rose?

A. I wouldn't know.

Q. Did you talk to them on or about September 26? A. Yes, sir.

Q. Why did you go to see them?

A. I went to see them because it was known to me that they had sold turkeys to Northwest.

Q. You were trying to stop them from selling turkeys to the Northwest?

(Testimony of Donald E. Rodeback.)

A. I was not. I went there to request Mr. Smith to show me invoices, to let me copy the invoices on sales of turkeys made to Northwest Poultry Company. I might add, if I may, that any conversation I had with Mr. Smith was more or less informal, beyond the point of just asking to see his records. I have known the man [28] for ten years and talked to him as a personal acquaintance, and I thought as a friend. He was very much wrought up over the situation and we talked for some time. As I say, I told him that anything I said to him was my own personal view and certainly off the record, so——

Q. Off the record?

A. In connection with the turkey matter I did ask him for his invoices. As a matter of fact, when I called on Mr. Smith I took with me a subpoena duces tecum, issued by our office.

Q. Exactly.

A. And served it, and beyond that, as I say, any conversation we had was off the record.

Q. You were sent out from this office to see these people, weren't you? A. I was; yes, sir.

Q. You didn't go out for a personal call on them?

A. I was sent there merely for the purpose of serving the subpoena duces tecum, so I had official instruction from the office to call upon him and serve the subpoena, but, as I added, I knew him personally and talked to him for some little time after the subpoena had been served.

(Testimony of Donald E. Rodeback.)

Q. How long have you known Mr. and Mrs. Spath?

A. I met them only on the evening that I called there. I did know, or I had seen Mr. Spath around the Terminal Sales Building, in that he worked for Mr. Smith and is an electrician. I was in the [29] Terminal Sales Building for several years myself.

Q. You regard this Mrs. Rose Smith as a truthful person, do you, Mr. Rodeback?

A. I don't know Mrs. Smith. I had never met Mrs. Smith prior to the day I called there.

Q. Now did you tell the Smiths that Norton, by his stand, deliberately misled the growers to make them think that he was sticking up for them and was giving them such a good deal and the only reason he was doing it was so that he would get all the turkey sales and the others killers would not get any turkeys, which you said was very unfair and unjust? Did you so state?

A. I said part of that. I didn't make the statement—that statement fully, no.

Q. How is that now? A. Now——

Q. What did you say? What did you say?

A. I told them that Mr. Norton, by adopting and following the policy that he had in connection with Order G-93, was in a position to get—I think I used the term the lion's share of the turkeys, although practically in the same breath I stated, and my statement was reiterated by the Smiths, that Mr. Norton could not possibly handle all the

(Testimony of Donald E. Rodeback.)

turkeys for the duration of the fall turkey operation; any processor in the business would necessarily get birds perhaps to the capacity of his plant, because of the labor situation particularly. But I did state that if the growers were [30] selling to the Northwest Poultry & Dairy Products Company for a deduction of less than the amount called for in Order G-93, that the grower would, in effect, be getting more than his ceiling price and be in violation of Maximum Price Regulation 269, and that they, therefore, should not sell to anyone without insisting on the proper deduction being made until this matter was properly settled. Then I said if the thing was settled in the courts and it was proper that a rebate should be made, that Northwest or anyone else would undoubtedly be very happy to make such a refund but the law would not have been violated.

Q. Did you refer to a man named Clark?

A. In talking to the Smiths?

Q. Yes.

A. I could not be sure whether I mentioned Mr. Clark or not. I possibly did.

Q. Do you know a man who is in that business by the name of Clark?

A. He is manager of the Columbia Produce Company.

Q. Yes. Did you tell them this, or say to them, "Why don't you sell to an honest man like Clark?" Did you say that?

(Testimony of Donald E. Rodeback.)

A. No, I don't believe I did. I told them that I was sure that if they sold to Mr. Clark that they would get satisfaction; they would get a fair grade and fair weight.

Q. Did you tell them this, Mr. Rodeback: That some grower had taken a truck or car—this is the way it reads—went right down the middle of his trucks and split them in half, sold half to Clark, [31] Clark charged the high killing charge; two weeks later he sold the other half to Norton, who charged him the 30 and 35 cent kill; he expected to make two or three thousand dollars more than on his first bunch but he actually made less; Norton did not weigh right; told him any grower that did that was crazy. He sorted out all his culls and sold them last. He said—no—sold them last. I asked him who it was that wanted the high kill when it was so unjust; accused of him being Swift's, and so forth. Did you say anything along that line?

A. No, sir. That—the statement that I made in that connection is not even properly related in that allegation. I can repeat the statement that I made—that that was apparently written from, if the Court is interested in it, but I didn't make that statement in any sense.

Q. What did you say, apparently written what?

A. Pardon me?

Q. What did you say about this was apparently written?

A. I said there is nothing in that allegation just read that is correct.

(Testimony of Donald E. Rodeback.)

Q. Did you tell them this: That you had a lawsuit now on, and that the Government was going to collect three times the amount they overcharged, and that they could not make it stick, referring to the Northwest?

A. No, sir, I didn't make that statement.

Mr. Skulason: Well, there is so much more of this stuff here—— [32]

The Witness: I may say in connection with that, that I made a statement but that is not an interpretation, or the correct interpretation, of what I stated.

Q. What was your purpose in going out to these people, Mr. Rodeback?

A. My purpose in going out to them was to pick up invoices establishing if there was a violation of the Order G-93.

Q. You were sent out by whom?

A. I was sent out by the Portland District Office.

Q. Who is your immediate superior?

A. Miss Gallagher.

Q. And you are still in the employ of the Price Administration? A. Yes, sir.

Q. Have you received notice that you are going to be fired? A. No, sir.

Q. Hasn't the matter come from Washington on account of what you did here that you are going to lose your job?

A. No, sir. I hadn't heard of it.

(Testimony of Donald E. Rodeback.)

Mr. Skulason: Well, that is all I want to ask him, your Honor.

Redirect Examination

By Miss Gallagher:

Q. Is it your practice, is it the practice of our office, Mr. Rodeback, in following up any kind of an investigation, to go not only to the one person you are investigating but also to go to as many producers as possible, or to as many sellers as possible who have had dealings with that one person you are investigating? [33]

A. Yes, with every case.

Q. Is that the reason you went out to Mr. Park and Mr. Smith?

A. Mr. Spath and Mr. Smith.

Q. To Mr. Spath and Mr. Smith, yes.

A. They were known to have sold to Northwest, and that is the reason they were called upon.

Miss Gallagher: Yes. Thank you.

Mr. Skulason: That is all.

(Witness excused.)

Mr. Skulason: Now, your Honor, if you are going to take testimony, I don't know what the Court is going to do with this—if you are going to take testimony of course I want to submit testimony as to the actual practical operation of this order, and I am ready to do it just as soon as I can get Mr. Norton and some other witnesses over here, but I didn't know how far we were going this morning.

The Court: You ask for a temporary restraining order?

Mr. Skulason: Well, I have asked that pending the suit they be restrained. I haven't asked for a formal order, but pending the suit that they be restrained from enforcing this order. Our whole theory is this order is absolutely void and, therefore, any proceeding under it is void.

The Court: I understand. I will try them both together.

Mr. Skulason: May I make another observation, your Honor? It [34] will help the Court to understand the practical situation here. I have here a document dated September 11th, 1944, addressed to the Food and Price Section of the Office of Price Administration, 1208 Bedell Building, Portland, Oregon. It is brief but I think interesting.

"Over seventy-five turkey growers from Washington and Oregon, owning nearly 300,000 turkeys, met at Portland, Oregon, in the Bedell Building September 11, 1944, at the request of Mr. McCargar, Food Price Section of the OPA, to discuss the new orders covering the marketing of the 1944 crop of turkeys.

"After a general discussion between the OPA and the growers, Acting-President of the growers, Mr. A. L. Hamilton, of Chehalis, Washington, selected a seven-man committee to work with him in outlining changes needed in the new order G-3 to make it acceptable to the turkey producers of Oregon and Washington. It was felt that the enforcement of Order G-3"—

The Court: 93?

Mr. Skulason: No. There is another one called G-3, sort of a clarification of G-93.

Miss Gallagher: No. G-3, Mr. Skulason, is quite different.

Mr. Skulason: Well, it defines who is a wholesaler and processor, yes; but the both of them are together and they are both included in this suit. I have attacked them both.

"It was felt that the enforcement of Order G-3 as it is at present would result in a definite loss in the net profit to [35] the turkey growers.

"The changes in G-3 urgently demanded by the committee are as follows:

"1. That the processor be allowed to retain his status as heretofore regarding the processing and wholesaling of turkeys at full ceiling prices. This to leave the wholesaler in the same position he had prior to the Order G-3.

"2. That the maximum price charged by the processor to the turkey growers for hauling, killing, picking and cooling be no more than 30 cents each for hens and 35 cents each for toms", the present charge.

"3. That these changes be effective in the states of Washington and Oregon only."

This is signed by quite a large number of them—by the Acting-President and others.

Then on the assumption that anything connected with this may enlighten your Honor—it may be that you know wall about these regulations and Acts—I

would like to ask permission to read a letter addressed by the National Turkey Federation to Mr. C. W. Haldeman, Head of the Poultry & Egg Section, Food Price Division, Office of the Price Administration, Washington, D. C., dated September 18, if I may read that, your Honor.

The Court: Yes.

Mr. Skulason: "The controversy on G-93 goes on and on. It is very evident that Miss Kent is obsessed with the idea that G-93 [36] should stick, and it is going to stick if it kill her. Frankly, I think it has become a matter of principle with her to keep the order in force. I doubt seriously if she is taking into consideration what would be best for the industry. I may have misjudged her, but after talking with turkey growers and processors all over Oregon and Washington, I find that practically no one in this area wants G-93.

"The reason I am bothering you again is that our Turkey Federation representatives in Washington and Oregon have requested more assistance. Miss Kent has made the statement that very few people in this area are protesting against G-93. After traveling all over this area, I can truthfully assure you that the overwhelming majority of growers and processors want the order revoked or the correct interpretation given to it.

"Enclosed is some of the correspondence and wires on this expressing the feeling of many people. This is a fair cross-section of the whole problem. On top of the pile is a copy of my letter to

your office of June 6th. This summarizes the whole thing and gives you the whole picture in a nutshell.

"The processors in this area actually fear the wrath of the growers after the war. They are afraid to charge this excessive amount for fear that growers will not come back to them after the war."

Well, they are leaving now.

"The ill effects of this order are mainly two-fold. First, [37] it is forcing growers to process at home and to establish their own community processing plants. This will mean a poorer quality product than if the birds could be marketed through the plants that are equipped to do the job properly and to take care of the birds after they are dressed.

"Another ill effect is that this order gives cooperative marketing agencies an unfair advantage over independent marketing agencies. I personally am very much in favor of cooperative marketing but do not like to see co-ops given this unfair advantage over independents. Some of the co-ops are using G-93 as a selling point to get growers to market through co-ops. The cooperative can pay back to the grower—as patronage dividends—the overcharge for processing that G-93 makes mandatory.

"The marketing methods that have been in use in Washington and Oregon represent a progressive step that should not be discouraged. Here growers and processors obtain their fair share of income from turkeys and speculation is largely eliminated from the marketing deal.

“As the executive officer of the organization representing the turkey growers of this country, I make this final appeal to you to see that justice is done and that the vanity of one individual not be allowed to prevent the sensible and practical solution of this matter.

“This G-93 was never intended as a minimum processing charge but to set a maximum. If it could be interpreted only as [38] maximum processing charge, it would be satisfactory to everyone concerned. No one has ever yet been able to give me an answer as to why the order should be interpreted as setting minimum processing charges. Processors do not want to charge these excessive processing prices and growers, of course, do not want this, as it means a loss of thousands of dollars to many of them.

“Some say that there is one large processing outfit that influenced the issuance of this G-93 to give them an excessive margin of profit. Growers name the firm, but I cannot, of course, go to that extreme without making myself liable to prosecution.

“As in the past, the executives of the National Turkey Federation approach the Office of Price Administration with the attitude of friendly co-operative.”

And so does my client, your Honor.

“It is our conviction that you are taking the action on all matters that you sincerely and honestly believe to be for the best interests of every-

one and to the final end of preventing and controlling inflation. We desire to continue to work on this basis.

“To assure you that we prefer to work on this basis, let us look for a moment at this G-93 matter and some of the things we might have done.

“The case of Northwest Poultry and Dairy Company lends itself readily to public ridicule of OPA. Last year, this company raised its processing charges a few cents, I believe to 30 cents [39] each for hens and 35 for toms. The regional OPA levied a fine of \$500 against this processor and made him restore his processing charges to their original basis. Now comes G-93 forcing the processor to charge a great deal more for processing than at the time he was fined \$500. This story could have been placed in the hands of our representatives and senators and given to the press. We have not taken this approach and hope the time never will come that we must work in this manner.

“Let us consider what will happen if G-93 is kept in force and that its interpretation is not changed to being a ceiling on processing charges rather than fixing charges at a rate never heard of before by the turkey industry.

“As stated before, there will be a great deal of farm dressing and dressing in community plants that are not equipped to handle birds properly. This means a handicap to getting turkeys for our armed forces and means a poor quality product when it is obtained. Both servicemen and civilians

will eat poorer quality turkeys and the per cent of total waste will be high.

“Another final result is that the OPA suits against processors—who refuse to charge excessive processing prices—will come to an inglorious end. I personally question the legality of OPA to set minimum or floor prices on processing. These suits will be thrown out of court and OPA ridiculed as the final result. Even if the legal status of the present interpretation of G-93 is [40] sound, you will find it necessary to go a long way to find a judge and jury that would decide in favor of OPA in any of these cases.

“I’m through, now, Haldeman. There will be no more of these letters to you about G-93! You know the story and there is no use repeating it.

“If you want to settle this matter, wire or phone the Pacific Regional Office urging strongly that they either revoke G-93 or interpret it only as a ceiling on processing charges—not a floor.

“You are quite right in your contention that regional offices should be given authority to make decisions. However, in cases like this when the authority to make decisions is being used to protect the vanity—or poor judgment—of one person and to the hardship of everyone else, it would seem only logical for the National Office of Price Administration to make the decision in the best interests of justice.”

Now there have been some changes made, haven’t there, Miss Gallagher, lately?

Miss Gallagher: Yes, there was an amendment.

Mr. Skulason: To ameliorate this thing and they are receding from this position, I think.

Miss Gallagher: That, your Honor, is probably a very good statement of the attitude of scores of growers and processors.

The Court: As Henry McGinn used to say, who wrote this letter?

Mr. Skulason: I don't know the man but it is a good letter. [41]

The Court: He always wanted to know who wrote it for the man that signed it.

Mr. Skulason: Yes. I remember.

Miss Gallagher: However, I still maintain, your Honor, that all of this information should probably be coming in, as well as an argument against the testing of the validity of the regulation in the Federal Court, under the action that has been filed by Mr. Skulason, not under our petition for an order. What we need is an order from you to inspect and copy the records, from which we can get the information that we need. Then we could bring an injunction suit in order to ask him to be enjoined. Even then the validity of the regulation would have to be submitted to the Emergency Court, in our opinion, and I think under the decisions that have been handed down by the Supreme Court and a good many District Courts, it may be that this whole question can be ironed out before we have to bring a lawsuit, but we are in the spot of being clear up into the turkey season, just as we were—this is a

plainful subject, I am afraid—last year into the middle of the berry season. At that time we were able to get a little bit of information. So far in this situation we have no information on which to base the proper kind of a lawsuit. If we have an order and can get it, then we can go ahead and bring the matter to a head and get it contested in some way.

Mr. Skulason: You Honor, may I suggest that my clients are amply able to respond to any loss or anything, for damages or [42] any fine that may be levied later. They are not going to get away.

Miss Gallagher: There is no questions of damages at all, Mr. Skulason.

Mr. Skulason: Well, if they are violating any order they are here and they will respond. The thing is to take the brakes off here and let us go on with business.

The Court: The first thing is to find out what the amendment in the spring by Congress meant. The Supreme Court upheld last winter or spring the provision in the original Price Control Act that withdrew jurisdiction from federal District Courts, of all attacks as to the validity of price regulation. Now then, if that is still the law I can go no further as to your case, Mr. Skulason.

Mr. Skulason: I supposed the amendment was intended to meet that very situation.

The Court: Yes.

Miss Gallagher: The exclusive jurisdiction, your Honor, is still by the amended Act granted to the

Emergency Court of Appeals, in the same language it was before.

The Court: The old language is in there?

Miss Gallagher: The old language is still in there.

The Court: Where did I get the strange idea that Congress had, in response to objections throughout the country——

Miss Gallagher: Had granted to you——[43]

The Court: Not to me——

Miss Gallagher: I don't mean to you——

The Court: ——but to courts generally, the jurisdiction that had been withdrawn? Where did I get that idea?

Miss Gallagher: There was a good deal of talk about it, a good deal of thought on the part of many people that Congress would amend the Act to that effect, and a lot of argument in Congress about it. The ultimate effect of the new Act is—the language is the same. I am quoting from memory on that. I would be terribly embarrassed to find out I was mistaken. I don't have the amendment before me to quote.

Mr. Skulason: When was it amended?

Miss Gallagher: June 30th, 1944. But the 2 (m) I have read, and read carefully, and have read the Congressional debate on it—not the debate but the report.

The Court: What has been your bulletin from the service?

Miss Gallagher: Oh, our bulletins are clearly to the effect that, without any exception at all, the

test of the validity of a regulation is in the hands of the Emergency Court and no place else, under the new Act and under the old Act.

The Court: Has there been any claim to the contrary by anyone?

Miss Gallagher: No claim to the contrary?

The Court: No claim to the contrary made anywhere?

Miss Gallagher: No, there has not been, except in an instance like this, perhaps, brought up in other districts; I don't know; [44] but upon the issuance of the new Act the language was analyzed in full and we get a weekly analysis of all the court decisions all over the United States.

The Court: Has a case like Mr. Skulason's been brought elsewhere?

Miss Gallagher: Not under 2 (m); not under the section he is claiming. If so, I have had no notice of it.

The Court: Has there been any brought elsewhere claiming Congress has restored jurisdiction to the circuit courts as to validity?

Miss Gallagher: No, sir, not as far as I know.

The Court: Do you have any on that?

Mr. Skulason: I haven't had time to run it down. I expected the Court would allow some time for a little further briefing on this, I have been so crowded with these other things, but I am going largely on the opinion of that Mr. Diggs, who, it appears, is a high-class lawyer, and he writes, and I have his letters here, there is no question about the

jurisdiction under that 2 (m). That is his opinion.

The Court: Is he a prominent lawyer in Washington?

Mr. Skulason: Yes, your Honor. I am told he is.

The Court: Could you read us that part of his letter?

Mr. Skulason: Yes, your Honor. I will read it.

The Court: How do you spell his name?

Mr. Skulason: D-i-g-g-s; and this is actually written by [45] an associate of his, I see now, by the name of Cisco, Byron R. Cisco, and there are several wires here also about this thing.

The Court: Well, you know what I want.

Mr. Skulason: Yes.

The Court: If in the profession there has been a claim from responsible quarters made as to what Congress intended by what it did, I want to know it.

Mr. Skulason: He wrote to Mr. Norton on the 23rd of August, to begin with: "Mr. Diggs"—this is Cisco who signed it—"Mr. Diggs has told me of his long-distance conversation with you on yesterday, and the discussion which related to your rights and remedies in connection with the proposed action by OPA officials." That was when he was notified to disclose his accounts.

"The Emergency Price Control Act of 1942, under which the OPA is operating, was amended recently, and I call your attention to the amendment of Section 2 of the Emergency Price Control Act of 1942, Sub-section (m)", and then he quotes it.

"In my opinion, the Office of Price Administration is without power to issue regulations or orders

unless the same are of general applicability and effect. There is a very serious question in my mind whether or not authority may be delegated to zone or local district offices to issue regulations affecting solely certain communities and having no effect other than in the particular community for which it may be provided.

“As I understand your problem, the attempt by the [46] district office in San Francisco to promulgate its local Order G-93, applicable only to that particular zone or area, would be to require the handling of poultry on a loose basis rather than upon a kill-and-haul basis”—on the poundage basis. “Here again, we are of the opinion that the OPA is without power or authority to effect a change in your customary method of doing business, established many long years ago and carried on continuously in this manner up to the present time.”

There is a specific statute on that.

“If we also understand the situation, their main reason for enunciating this policy would be to preclude processors like yourself from returning to the grower a price in excess of what had been determined as a ceiling upon that particular commodity. As a matter of fact, we know, and it is a matter of general knowledge, that the cooperatives return to their members an amount in excess of that which might be received through your method, but still no effort is made to compel the cooperatives to abide by the full provisions of G-93. Therefore, it is our opinion that said local order is discriminatory, unfair, and unjust.

“If you see fit, you might institute an action in the United States District Court in Portland and secure a declaratory judgment against the OPA, its officers and agents, which would, for once and all time, put an end to such contemplated actions as they have heretofore threatened. [47]

“Mr. Diggs advises that he will meet with you in Chicago on the 9th and 10th of September, but he does not feel that he could stay throughout the entire convention. If you so desire, we shall be glad to prepare a concise brief of the law as we understand it, and have it available for you by that time, and you may go over the entire situation with Mr. Diggs when you will have ample opportunity to discuss all phases of this in person.

“My kindest personal regards, sincerely yours,
Byron R. Cisco.”

They did meet in Chicago and discuss the entire matter. There is a number of telegrams about this thing along this same line, your Honor.

The Court: Nothing yet about the jurisdictional question.

Mr. Skulason: Well, only what I read you there as to their opinion about jurisdiction under 2 (m).

The Court: That you could get a declaratory judgment?

Mr. Skulason: Yes.

The Court: Now Miss Gallagher, someplace in the last few days I have read in the Advance sheet, no doubt it will be in the Federal Supplements, you know in the blue ones——

Miss Gallagher: Yes.

The Court: —where this question was discussed and where a declaratory judgment was given under—it must have been under 2 (m). Is your point narrower than I have been stating it, Miss Gallagher, that 2 (m) does not give authority to restrain a [48] regulation for invalidity but it gives authority to entertain declaratory proceedings?

Miss Gallagher: 2 (m). May I borrow that, Mr. Skulason?

Mr. Skulason: Yes.

Miss Gallagher: 2 (m) provides by its terms, that “any person may appeal to the District Court for an order or declaratory judgment to determine whether any such action, or failure to act, is in conformity with the provisions hereof, and otherwise lawful.” That gives a wide scope, I think, under this section, for the Court to declare whether or not the action taken, or the action failed to have been taken—not taken—is lawful under the provisions of 2(m). It is my contention that the validity of a regulation is not included in Section 2 (m) as one of these things which may be tried out by the District Court.

The Court: How about the validity of Order G-93 and Order G-3?

Miss Gallagher: The regulation, or orders issued thereunder. They are all, in our contention, subject only to the Emergency Court.

The Court: You know of no court that has been called on to interpret 2 (m)?

Mis Gallagher: No, I don't. I would be interested to look for the case that you mentioned.

The Court: I thought you got literature every day from your legal bureau?

Miss Gallagher: Once a week, your Honor, we get literature. [49]

The Court: Well, once a week. Haven't you had some?

Miss Gallagher: Not unless it came within the last half of last week, when I was out of Portland. Ordinarily if any great big question comes up, any big decision which will affect us generally, we get a teletype report on it.

The Court: Yes.

Miss Gallagher: There have been none of those. Otherwise we get our weekly information and all the decisions that have been issued by the Federal Courts.

The Court: I can't go forward in your case until you are prepared to make a final presentation.

Mr. Skulason: I beg pardon?

The Court: I can't go forward in your case until you are further prepared on this jurisdictional question.

Mr. Skulason: No, your Honor. I think we have all of these things in the Law Library. I did spend an hour over there but I didn't look for that particular point.

The Court: Well, we meet that at the threshold.

Mr. Skulason: Yes, your Honor, that is right; that is, as far as the suit is concerned.

The Court: Yes.

Mr. Skulason: But as far as an order to show

cause is concerned, of course you have jurisdiction.

The Court: Yes.

Mr. Skulason: And you could not grant relief to my client, [50] if that is what you think you should do from this order to show cause, by not having, or requiring us to have the books examined, and we will proceed as best we can under the old regulations and G-93, and then thereafter thresh that out in this lawsuit or proceed in some other appropriate manner.

The Court: I don't think we want to do that, Mr. Skulason. If you think you can prepare yourself fully on the jurisdictional question this afternoon I could hear you at nine o'clock in the morning further on that, you and Miss Gallagher, and if you can satisfy me then that 2 (m) gives me jurisdiction, contrary to the view that Miss Gallagher holds, to pass on the validity of a regulation and an order, then I will find the time right away, this week, as soon as the parties can get ready to go into the merits, and take testimony.

Mr. Skulason: Yes, your Honor.

The Court: And my ruling would be on your case and on what she wants at the same time. On the other hand, if you couldn't persuade me that the Congress intended to revest the courts with the normal jurisdiction, which I have understood from the public press was the intention of Congress, why, then I would have the discretionary matter to deal with as to whether I should let them into your books and records down there, and I am inclined, Mr. Skulason, to think that I should do that, that

I should let them into your books and records, unless I have jurisdiction.

Mr. Skulason: I shall immediately wire to Mr. Diggs at [51] Washington to submit whatever authority he has to me by wire, and also consult the records and books in the Library here.

The Court: Yes. Well, I will put it this way: I don't know whether you can get a response to your wire. It may take some time.

Mr. Skulason: Well, I think I can by wire. I hope to.

Miss Gallagher: Your Honor, this is inconsistent on my part, I know, to suggest——

The Court: Well, that is the woman part of it, Miss Gallagher.

Miss Gallagher: Well, there may be——

The Court: That is what makes the other sex so delightful—one of the many things.

Miss Gallagher: Mr. Skulason may have some difficulty about getting his authorities ready tomorrow morning, and it is equally true of me.

The Court: All right. Let's make the date Wednesday morning at nine o'clock.

Miss Gallagher: I was going also to say, I am due to leave for La Grande to try a case up there the next day.

The Court: Well, how about Friday?

Miss Gallagher: That is agreeable to me.

The Court: All right. Be here Friday.

Mr. Skulason: That is agreeable to me also.

The Court: All right. Our date is for nine o'clock Friday morning. [52]

Mr. Skulason: If we should satisfy your Honor you have jurisdiction, then you will be prepared to hear evidence?

The Court: Yes, right away, as soon as you can prepare it. We will have to sandwich it in with the current calendar.

Miss Gallagher: What do we do with Mr. Abendroth, and Mr. Lenske's situation in that case? Of course, it doesn't involve any of this.

The Court: And it is not an emergency. You are going to La Grande?

Miss Gallagher: I am going to La Grande, yes.

The Court: You can't do everything at once, yourself.

Miss Gallagher: What will we do—let it rest until Friday?

The Court: Oh, we will let it rest.

Miss Gallagher: We do seriously want to get at those records, however, as soon as possible.

The Court: All right.

Miss Gallagher: Thank you, your Honor.

(Thereupon, at 12:17 o'clock P. M., an adjournment herein was taken until Friday, October 6, 1944, 9:00 o'clock A. M.) [53]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

I, Alva W. Person, hereby certify that on Monday, October 2, 1944, I reported in shorthand all of the proceedings had and evidence given in the above entitled matter before the Honorable Claude McColloch, Judge, and the proceedings had and evidence given in said matter was thereafter caused by me to be reduced to typewriting and the foregoing and hereto attached transcript, pages numbered 1 to 53, both inclusive, constitute a full, true and accurate record of all of said oral proceedings had and evidence given upon said hearing on said date.

Dated at Portland, Oregon, this 20th day of October, A. D. 1944.

ALVA W. PERSON

Court Reporter.

[Endorsed]: Filed Nov. 10, 1944. [531½]

In the District Court of the United States
For the District of Oregon.

Civil No. 2565.

CHESTER BOWLES, Administrator of the Of-
fice of Price Administration,

Applicant,

vs.

NORTHWEST POULTRY AND DAIRY PROD-
UCTS COMPANY, an Oregon corporation,
and C. W. NORTON, President,

Respondent.

Civil No. 2575.

NORTHWEST POULTRY AND DAIRY PROD-
UCTS COMPANY, an Oregon corporation,

Plaintiff,

vs.

CHESTER BOWLES, Administrator of the Of-
fice of Price Administration, and CECELIA
P. GALLAGHER and FRANZ WAGNER,
Defendants.

Portland, Oregon, Friday, October 6, 1944.

9:00 o'clock A. M.

Before:

Honorable Claude McColloch, Judge.

Appearances:

Miss Cecelia P. Gallagher, Enforcement Attorney, Office of Price Administration, Portland District; Mr. Franz E. Wagner, District Enforcement Attorney, Portland District Office [54] of Price Administration, and Mr. Dunlap W. Cannon, Jr., Litigation Attorney, Region 8, Office of Price Administration, appearing for the Applicant in Civil No. 2565 and for the Defendants in Civil No. 2575.

Messrs. B. G. Skulason and Wilber Henderson, Attorneys for the Respondents in Civil No. 2565 and Attorneys for the Plaintiff in Civil No. 2575.

PROCEEDINGS.

The Court: I see you brought up the big guns, Miss Gallagher, militarily and geographically. I was thinking of Portland as up from San Francisco—it is up on the map. And I notice you have an associate, Mr. Skulason.

Mr. Skulason: Yes, your Honor. His name appears on the complaint and he is here.

The Court: I didn't notice that the other day.

Mr. Skulason: Well, it is there.

Mr. Wagner: I have here, your Honor, a motion to dismiss, which we have served this morning, and which I assume the plaintiff will have no objection to having filed, it being a motion to dismiss upon the jurisdictional ground, which is at issue. And I assume also that the plaintiff will waive any formal notice of time of hearing of the motion.

Mr. Skulason: Yes. That is all right.

The Court: It may be filed.

Mr. Wagner: We also have, your Honor, Mr. Cannon here from San Francisco, whom we would like very much to have appear as one [55] of the attorneys of record, if your Honor will permit.

The Court: He may appear.

Mr. Wagner: A third matter, during Miss Gallagher's absence I have written up a brief covering the various points. It is a memorandum covering the various points which we think will help to clarify the matter. Miss Gallagher, of course, knowing much more about the turkey business than the speaker, has expressed her desire to continue with the matter where she left off last Monday and review the points that are raised in the memorandum and continue with the argument.

The Court: Since she is the turkey expert I will ask her if she brought any colored marbles.

Miss Gallagher: No. Should I have?

The Court: If you are going to be in the turkey business you have to have colored marbles. They won't eat otherwise.

Mr. Cannon: Your Honor, before Miss Gallagher starts, so the record will be clear, as I understand it, the motion to dismiss, which was filed on behalf of the defendants today, notice of which motion was waived by counsel for plaintiff, I understand the argument which we make today will be in connection with that particular motion to dismiss, inasmuch as the same questions are involved in that motion as are involved in the other matters

here, namely, the question of whether or not this Court has jurisdiction.

Miss Gallagher: If your Honor please, in the suit brought [56] by the plaintiffs against the defendants here they have asked your Honor to enjoin the defendants from attempting to enforce, or enforcing, the provisions of Regional Orders G-3 and G-93. Also they have asked your Honor to restrain the defendants from making an inspection of records, as has been requested formerly.

In May of 1944 the Regional Administrator of the Office of Price Administration for Region 8 in San Francisco duly issued Order G-93, which was published in the Federal Register. It was issued pursuant to Section 1499.18 (c) of the General Maximum Price Regulation on August 30th, 1944. The Regional Administrator, pursuant to Section 1429.14 (e) of Revised Maximum Price Regulation 269 issued Regional Order G-3. That order defines wholesalers and processors of turkeys. These two orders are the ones involved in the suit filed by the plaintiff.

In support of our motion for a dismissal of the complaint we offer these authorities in this argument.

The Emergency Price Control Act as it was originally passed by Congress in 1942, and as it was amended and extended by the Stabilization Act in 1944, provides, in Section 204 (d):

“The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have ex-

clusive jurisdiction to determine the validity of any regulation or order issued under Section 2, of any price schedule effective in accordance with the provisions of Section 206, and of any provision of any such regulation, [57] order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.”

The language that has just been quoted is still contained in the amended Act of June, 1944, and has not been changed.

The question of the exclusive jurisdiction has been passed upon by the United States Supreme Court in the case of *Lockerty v. Phillips*, 319 U. S. 182, decided in May of 1943. The Court sustained the action of the lower court in dismissing the complaint. The Court then said:

“By this statute,” referring to 204, “Congress has seen fit to confer on the Emergency Court (and on the Supreme Court upon review of decisions of the Emergency Court) equity jurisdiction to restrain the enforcement of price orders under the Emergency Price Control Act. At the same time it has withdrawn that jurisdiction from every other Federal and State Court. There is nothing in the

Constitution which requires Congress to confer equity jurisdiction on any particular inferior Federal Court."

The Lockerty case was cited and reaffirmed by the Supreme [58] Court in the case of *Yakus v. United States* in March, 1944, found in 321 U. S. 414. There have been a good many other cases, both in the Federal District Courts and a few in the Circuit Courts of Appeal, which follow the reasoning in *Lockerty v. Phillips* and *Yakus v. United States*. Some of these cases are *Bowles v. Rock*, in the District Court of Nebraska, decided on July 7th, 1944, the *Consolidated Water and Paper Company v. Bowles*, in the District Court of the District of Columbia, decided on July 5th, 1944; *Henderson v. Thomas Stores*, 48 Fed. Supp. 25; *Henderson v. Kimmel*, 47 Fed. Supp. 635; and *Diefenbaugh v. Cook*, 47 Fed. Supp. 645.

Our own Circuit Court of Appeals for the Ninth Circuit has passed upon this question in two cases.

In the case of *Rosenweig, et al, v. United States*, decided June 3rd, 1944, it was urged that the Maximum Price Regulation 169 was unenforceable because it had failed to bear, according to the contention of the plaintiffs, the signature of the Secretary of Agriculture. The Court, speaking through Judge Denman, said:

"It may or may not have been approved, but that is not here pertinent for we are of the opinion that appellants' claim that the regulation did not become enforceable is not more than a claim that the regulation is invalid.

“Appellants do not claim that they have at any time invoked the jurisdiction of the Emergency Court of Appeals provided [59] in Section 203 (c) and (d) of the Act, or that the Court has held the regulation to be invalid in any previous proceeding whatever. The District Court and this Circuit Court of Appeals have no jurisdiction to consider the contention that the regulation is invalid.” Citing *Yakus v. United States*.

A second case in which this matter was passed upon by the Ninth Circuit is that of *Taylor v. United States*, 142 Fed. (2d), page 808. This case was decided on April 26th of this year, and it involved a rent regulation. The Court said:

“Then, moreover, it should be noted that we are without jurisdiction to pass upon the validity of Rent Regulation No. 28, in view of the provisions of section 204 of the Act.”

You asked the other day if there have been any recent cases since the amendment of the Act. There is the case of *Bowles v. Nu-Way Laundry Company*, decided in the Tenth Circuit, appealed from the Western District of the District of Oklahoma. This decision was entered on August 28th, 1944, subsequent to the amendment of the Act.

In this case the trial court had held that inasmuch as the plaintiff had sought an injunction, that equity powers of the court had been invoked and by general equitable principles the court was not required to compel the defendant to operate his business at a loss, even though the Court could not

pass upon the validity of the regulation. The Circuit Court overruled the decision of the lower court, followed the cases of *Lockerty v. [60] Phillips* and *Yakus v. United States*, and said:

“In arriving at its conclusion, we think the learned trial court confused the legal and equitable questions involved. Whether the appellee violated any of the applicable price regulations is a legal question which the Court must decide on the facts presented, and equitable considerations do not enter into that question.”

The Court: What page are you reading from?

Miss Gallagher: I am reading from page 5, your Honor. “Any equitable jurisdiction to test the validity of a regulation or the fairness of a price schedule, established thereby, is exclusively committed to a single court created by the Act (Section 204(e) and specifically authorized, subject to review by the Supreme Court, to adjudge the validity of any regulation, order, or price schedule, and to set aside or annul the same.”

They also cite *Bowles v. Willingham*.

The Court: The controlling date would be the date when the District Court acted.

Miss Gallagher: Oh. I don't have the date of the District Court action. It was November 4, 1943, I think, the District Court passed upon the matter.

Those, your Honor, are the cases of first importance, although the books are replete with many other cases decided by other Federal District Courts passing upon the question of whether the Federal

District Courts have jurisdiction to pass [61] upon the validity of a regulation or order.

It is our contention that the Act itself vests in very clear language jurisdiction in the Emergency Court of Appeals, that the Act was not amended so as to change that jurisdiction, and that the cases passed upon all down the line have upheld our contention.

Mr. Cannon is prepared to discuss the provisions under 2 (m) which were raised by Mr. Skulason and under which he claims the Court here has jurisdiction.

The Court: Let me hear the other side, then you close, Mr. Cannon.

Mr. Henderson: May it please the Court, everything that has been said by counsel up to date, having been addressed to the Court prior to the 30th of June this year—

The Court: Was that when the President signed the law?

Mr. Henderson: That is when it became effective, I believe; it is dated that way, in any event—would have been pertinent, the Lockerty case, the Yakus case and all of those cases, but those were the very cases and the things that grew out of them, and the grievances of the people were what provoked this particular amendment.

Now if you were following the debates in Congress about this time during the month of June, participated in, I believe, in the Senate principally by Mr. Taft, of Ohio, who was on the Banking and

Currency, you will remember, or I remember reading [62] in the paper of him stating something about somebody talking about the Emergency Court of Appeals being a kangaroo court. He discussed the Yakus case and what it held, and it was those things, the claim that this Emergency Court of Appeals was a kangaroo court, a court dominated by the Administrator of the Office of Price Administration, that prompted undoubtedly the passing of this law.

Now let's consider a rule of statutory construction. We have a law providing a particular thing, limiting a particular remedy, providing a particular procedure; then we have a legislative body in face of that passing a law bearing directly on that particular subject and directing another cause of action. Now can there be any question under those circumstances, where the matter was before the legislative body, the grievance was before the legislative body, that the Congress knew what it was doing when it passed that law?

If this law here, your Honor, was before your Honor as an original law, and this was in there with this provision as to the exclusive jurisdiction, you would have an entirely different situation as far as the statutory construction. Then you would be able to say, "Well, since this was all written at one time, since it was all written together and they have said at one time the exclusive jurisdiction is in the Emergency Court of Appeals, then I must give weight to that." But you don't have that; you have a law providing that the Emergency Court of

Appeals shall [63] have exclusive jurisdiction; then you have an act of Congress on that particular subject passing a law dealing directly with this particular subject. There can't be any doubt about the language. You can't suppose that these people back there, both in the Senate and the House, didn't know the meaning of the English language when they wrote into this law, this 2 (m), because it is very clear, it is very comprehensive, and it is very direct. There is no equivocation about it at all. It says, "Any person aggrieved by any action." It is not limited—any action. "Any person aggrieved by any action of any agency, department, officer or employee of the Government, contrary to the provisions hereof, or by the failure to act of any such agency, department, officer or employee, may petition the District Court of the District in which he resides or has his place of business for an order or a declaratory judgment to determine whether any such action, or failure to act, is in conformity with the provisions hereof, or otherwise lawful, and the court shall have jurisdiction to grant the appropriate relief."

Now, if the Court please, there is a very clear confirmation of authority in this Court to grant whatever relief we are asking for, if we are able to prove what we claim.

There is another thing that was discussed in Congress and another thing that was before Congress at that time. Many of these people were sending in complaints that they wanted to try these cases, they wanted to try out their grievances in a [64]

court where they lived; that is, they wanted to be able to initiate the action in a court where they lived and not have to go back there. I remember someone at the time pointing out about somebody having to come clear across the continent practically to try a case in Boston. These things were before Congress and that was, as I say, all of this thing was in the mind of Congress when they had before it this particular amendment. The Administrator of the Office of Price Administration was ably represented on the floor of both the Senate and the House and in conference on this bill. The hearings on the bill are made up in large part of documents and testimony furnished by the Office of Price Administration and they had Senator Wagner, I believe, champion their position on the floor of the Senate, and I don't recall who upon the floor of the House, but anyway the Administration was well represented and they knew what was being offered for the senators and the House of Representatives to vote upon when this particular language was written in there. As I say, it is not the case like a bill being passed in its entirety, containing conflicting provisions. This is a case where a particular provision is in an Act; Congress meets and in direct opposition to that says, "We are going to grant this particular authority," which I say—which I say, if the Court please—puts the Court in an entirely different situation than if you had it in its original state.

Everything that has been said by counsel so far in this [65] case supports our position—supports

it by inference. It was those things the courts had decided under that Act that provoked Congress to do this particular thing; that is the cause of it; and it was in face of it and with full knowledge of what the court had said, that they passed this particular Act. So upon those decisions—we have a case here pointed out in the Circuit Court of Appeals decided as late as August of this year—the Circuit Court of Appeals. How could the Circuit Court of Appeals do anything but decide the case upon the issues framed in the lower court, and how could it possibly get to the Circuit Court of Appeals between the 30th day of June and the month of August? Obviously that particular case——

The Court: Couldn't in this Circuit.

Mr. Henderson: Well, I understand that this is about the fastest Circuit of them all.

The Court: It takes about a year.

Mr. Henderson: Those people who travel the circuits say it is; so if they could not do it in this Circuit they could not do it in any. So that particular case is just deciding the law as it stood, which we admit.

The Court: That seems clear.

Mr. Henderson: And so we say that is what provoked this amendment.

Now you have before your Honor just one thing, it seems to me. You have some plain, unequivocal language contained in an [66] act passed after the original provision that the Emergency Court of Appeals should have exclusive jurisdiction, you have

Congress saying, "I give to the District Court jurisdiction over any grievance by any person against any officer of the Administration for any act he has performed." The comprehensive word "any" used in any one of these terms — "any person," "any act," "any officer," "any agency."

Now that is clear, and I don't know of any rule—I don't know of any rule and I don't believe they have produced any rule, warning the Court to limit its jurisdiction over a grievance of a citizen of the country. If anything, the Court should be liberal in its construction as to what jurisdiction it should assume. When a person is before a court with a grievance, the court should be very hesitant about saying, "I will refuse to accept jurisdiction over this case. You ought to go back and file your action in Washington, D. C." There ought to be a clear mandate from Congress that you can't take jurisdiction. And I submit, if the Court please, that in view of the fact that this Act was passed and this jurisdiction was conferred after all these cases were decided, and after it was in there that they had exclusive jurisdiction, that Congress meant exactly what it said in that language, that you do have jurisdiction in this case.

Mr. Skulason: May I say just a word, your Honor? I think I said at the last hearing that I would make an effort to find [67] some authority or something bearing upon this question. Now I have made that effort and I have found nothing other than counsel has referred to here. We tried through the office, the local headquarters of Sena-

tor Cordon here to get the Conference Report and it is supposed to be in the mails but it has not arrived yet, and that might throw some light on the question of what Congress thought they were considering at the time.

I want to say this, too, because this is all I am going to say now. I have glanced through what remains of the brief that counsel for the defendants was reading from, remarks made by members of Congress there. Your Honor will note not one of them hits this point. They refer to other features of the amendment. So, as Mr. Henderson has said, here is a clear mandate, an act passed to cure a situation that had become intolerable, people being required to go back to Washington, and the whole argument is that we should proceed under the Old Act, that the protests should have been filed within the Act itself, and then relief sought in the Emergency Court of Appeals, and that is the very thing that we think Congress had in mind when it passed this amendment.

Mr. Cannon: May it please the Court, the complaint which was filed in this matter, entitled a complaint in equity, in Paragraph III of that complaint stated that "Jurisdiction of this action is conferred upon this Court by Section 2 (m) of the Emergency Price Control Act of 1942 as amended." The prayer of that complaint [68] asks that this Court declare certain orders issued pursuant to the Price Control Act invalid and pending the determination of the validity of said orders that the defendants and each of them be restrained from en-

forcing, or attempting to enforce, said orders, or from interfering with the plaintiff's business in any manner, and particularly from proceeding further in said show cause matter.

Thirdly, permanently enjoining and restraining the defendants, and each of them, from enforcing or attempting to enforce any of said orders in any manner, and from interfering or attempting to interfere with the plaintiff's said business.

Now again, so that the record may be clear, I understand that today our motion to dismiss, which has been filed and which counsel has agreed could be heard at this time, is being argued in connection also with whether or not your Honor should issue a restraining order, restraining the defendants from enforcing, or attempting to enforce, the orders in question here.

Now it is our position that of necessity, by virtue of the complaint herein, unless Section 2 (m) of the Emergency Price Control Act gives your Honor jurisdiction, that our motion to dismiss should be granted. Consequently it seems to me of primary importance that we carefully analyze Section 2 (m), not one sentence thereof or two sentences but the entire section, to ascertain therefrom as best we can what the congressional intent actually was. [69]

Section 2(m) reads in its entirety, "No agency, department, officer, or employee of the Government, in the payment of sums authorized by this or other Acts of Congress relating to the production or sale of agricultural commodities" — that is the first

thingfffi no agency, department, officer, and so forth, “ in the payment of sums authorized by this Act relating to the production or sale of agricultural commodities,” so I take it there is no question here that there is no dispute involving any payment of any sums authorized by the Government. Secondly, “or in contracts for the purchase of any such commodities by the Government or any department or agency thereof.” Likewise, there is no question here of any contract or purchase of any commodities by the Government.

Thirdly, “or in any allocation of materials or facilities, or in fixing quotas for the production or sale of any such commodities.” Likewise there is no question here of the allocation of materials or facilities for the sale of any commodity.

Now going back over these things again, we find section (m) itself relates to the payment of sums of money authorized by the Government, contracts with the Government, and allocations for materials or facilities. After that the section continues:

“——shall impose any conditions or penalties not authorized by the provisions of the Act or Acts, or lawful regulations issued thereunder, under which such sums are authorized, such contracts are made, materials and facilities allocated, or [70] quotas for the production or sale of any such commodities are imposed.”

Now reading that much of the Act it seems perfectly clear from that much of Section 2 (m) that it relates entirely to the imposition of conditions or penalties not authorized by the particular acts in

connection with the three things, payment of sums by the Government, contracts for the purchase of certain commodities, and allocations of certain materials.

Now the section continues: "Any person aggrieved by any action of any agency, department, officer, or employee of the Government contrary to the provisions hereof,"—Now counsel, as I understand it, relies entirely upon that particular wording in Section 2 (m). It seems to me perfectly obvious from reading that sentence in the light of the whole section that it refers, by saying "contrary to the provisions hereof," to a situation where there has been an unlawful imposition of certain conditions or penalties in connection with acts of course relating to the three things which we have enumerated, namely, payment of sums of money, Government contracts, and allocations.

Now as a matter of fact I think it is extremely important to clear up one situation, namely, that insofar as Congress' consideration of the Price Control Act was concerned Congress considered very carefully the entire Price Control Act. The committee hearing went on for months and months, as I know of my own personal knowledge. The section which refers to exclusive [71] jurisdiction was discussed at great length. The Act itself was renewed in its entirety, with certain amendments and—

The Court: Had its time run out?

Mr. Cannon: Yes, your Honor. The Act expired on June 30th of this year and one of the amend-

ments was the Act of June 30th, 1944. There is not any point in quoting just the amendment to the Act but the whole Act itself was re-enacted, with certain amendments, and I think it is a very clear rule of judicial construction that where possible sections of a particular act are presumed to be consistent with one another and to be construed as such.

Now speaking of the clear wording of the statute——

The Court: What is the connection between the Stabilization Act and the Price Control Act?

Mr. Cannon: Well, your Honor, the Stabilization Extension Act—to go back just a little bit, the Price Control Act of 1942 was amended in the fall, I believe, of last year; the year before by the Stabilization Act; and in actually re-enacting the Price Control Act it is provided that it can be cited, the amendments can be cited as the Stabilization Extension Act of 1942 as amended June 30th, 1944. In actuality certain of the amendments to the Stabilization Act of 1942 have no application to the particular problems we are concerned with here, except as related to Section 2 (m), which of course was made a part, in effect, of the Emergency Price Control Act. [72]

Now I feel of necessity that the entire Act would have to be read as one act, and in doing that it seems to me, in the first place, perfectly clear from the language of Section 2 (m) that your Honor has no jurisdiction. I can't see how possibly you could construe a sentence, which says any person aggrieved by actions "contrary to the provisions

hereof," and we know what the "provisions hereof" are, because of necessity you must read the section to find out what the provisions are, and the provisions are very unmistakably set forth in that particular section—in my opinion, that section alone would be enough to justify, or, rather, require your Honor to dismiss the complaint. But further than that, the section which Miss Gallagher has read to your Honor, section 204 (d), which, bear in mind, was re-enacted on June 30th and is now just as much a part of the Price Control Act as section 204, provides in unmistakable language that, "Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders."

Now there again it seems to me perfectly clear, from the very plain language of the statute, that Congress intended to, and did, keep in the Price Control Act the exclusive jurisdiction prevailing; and I think it is not without significance that in the more than three months which have elapsed since the amendment [73] to the Price Control Act that the Emergency Court of Appeals has functioned just as it has in the past. It recently was on the Pacific Coast, in Portland, in San Francisco, in Los Angeles, hearing cases. There has never been another case in the United States in which the courts—well, there has never been a case, of course,

in which the courts—they have taken jurisdiction under this sort of suit under Section 2 (m), but further than that there has never been a suit in the United States in which the plaintiff has attempted to evade the exclusive jurisdictional section by coming into court under Section 2(m), and I feel, your Honor, that insofar as the complaint itself is concerned, and the reliance on Section 2 (m) for jurisdiction, on the face of it it must fail.

Now one other thing I would like to touch on, and that is in connection with when actions may be stayed. There is a section in the Act, and this is an amendment and I know counsel for the plaintiff will be glad to know this is an amendment; it is section 204 (e), and that section is a rather lengthy section. I will read only certain parts which I believe applicable. That relates to the situations in which the District Court have authority to stay proceedings which are instituted pursuant to the Price Control Act.

The first, which is not applicable here, is in connection with criminal cases and provides that “within thirty days after arraignment,” and so forth, that the court may stay proceedings [74] if the defendant has made application—where? Made application to the Emergency Court of Appeals to protest the regulation because in the amendment it says if the defendant had made application to the Emergency Court of Appeals it was possible the defendant could actually protest the regulation before the District Court. It provides there in regard

to criminal cases that stays may be granted under certain conditions.

Now as to civil cases it provides in there that in any action brought under section—I don't want to read the whole thing. Well, "Notwithstanding the provisions of this paragraph"—I will read this—"stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment." In other words, in all civil cases which are instituted pursuant to certain sections of the Act that the stays shall be granted by the Court only within five days after judgment.

Now bear in mind, I think that section has no application whatsoever to this case other than to affirm and to indicate even more clearly to me, and I believe to your Honor, that Congress clearly intended that the exclusive jurisdiction provision, which was in our opinion an integral portion of the Price Control Act, should remain in effect, as particularly they re-enact it. And going back one moment more to Section 2 (m), it seems to me that if we read Section 2(m), as of necessity we must—and I do think this, that the Congressional Committee reports in which the [75] comments of the members of the Congress are significant—they are set forth in our brief—some of the statements that were made and some of the statements that actually appear in the committee report—I think it is apropos that I might refer to one or two of those. One is a quotation at page 9, of the Senate Banking and Currency Committee, reads as follows:

"The attention of the committee"—of the Senate Banking and Currency Committee—"has been directed to instances of the flagrant misuse of authority for the imposition of conditions or penalties totally unrelated to the purposes for which the authority was granted, as for example, the withholding from a farmer of a supplemental gasoline ration because of his failure to participate in a program of the War Food Administration. In instances where such things do occur, this amendment will afford an opportunity to obtain relief from the courts."

On the floor of the Senate Senator Wagner said, in explaining the amendment:

"The complaint has been made that other penalties were imposed in some of these actions. Actually there was no evidence before our Committee, but there was a statement that some of these other requirements had been imposed; and this would make the entire question certain."

Senator Taft said:

"Perhaps I can give an example of what the Committee was trying to reach, through citing an order issued by the War Food [76] Administration as to dairy products. They provide for various milk arrangements, pools, and other things, under the War Food Administration. This amendment does not relate particularly to the Price Administration. The Price Administrator had no objection, because he said he was not using other penalties anyway. It has more to do with the question of the War Food Administrator's actions. In other words,"

and this is Senator Taft's own words, "the purpose of the amendment is to prevent the enforcement of one Act by threatening penalties under another Act. The War Food Administrator could proceed under the statute which regulates him, but he would have to confine himself to the penalties provided in the Act. He could not call on the Price Administrator and say, 'Go after this fellow and take his license away for something he did in violation of our Act,' and threaten him with that action as a result of his alleged violation of the War Food Administration Act."

Now it seems to me, in view of the plain language, and in view of the explanation of that section, that there should be no question whatsoever that there was any intention on the part of Congress by that section to give the District Courts jurisdiction to pass upon the validity of price regulations in cases.

Now counsel has just mentioned the fact that none of these quotations from the brief actually go to the point he raises. My answer to that is they could not conceivably, because the point he raises has nothing to do with the section, and [77] certainly the discussion on the floor of the House, and the words that I have just quoted make perfectly clear that they refer to the amendment as a whole, and as such, and not to any particular portion thereof. So consequently, your Honor, I respectfully submit that upon a careful reading of the entire Price Control Act, first reading Section 2 (m), then reading the exclusive jurisdictional section,

the section that relates to stays, that backed up with the clear legislative history, should lead your Honor to but one conclusion—that there is no jurisdiction to entertain the complaint in equity which has been filed herein, entitled Northwest Poultry and Dairy Products Company, an Oregon corporation, vs. Chester Bowles, Cecelia P. Gallagher and Franz Wagner. Consequently our motion to dismiss the complaint should be granted, and naturally any restraining orders will be denied.

Mr. Henderson: If the Court please, may I just say a word on that matter?

The Court: Yes.

Mr. Henderson: Counsel has emphasized the fact that “the provisions hereof” refer to section (m), the preceding part of section (m), although it is an entirely different sentence and is much broader than the language would indicate.

Now to show the particularity with which Congress dealt when it was referring to sections and to subsections in this act, I just glanced through here and I want to point out how careful they were when they were referring to a particular section, in [78] confining the meaning to that particular section.

Notice here on what would be (c) of Section 2 this language: “he may without regard to the foregoing provisions of this subsection,” down to (c), “any regulation or order under this section”; under (e), “of this section.”

Now coming over on the next page, “nothing in this section shall be,” and so on.

Then under (f), "No power conferred by this section shall be construed to authorize any action contrary to the provisions and purposes of section 3."

"the powers granted in this section," is the language in (h).

And then (k), immediately before—no, in (l) immediately before (m), that "in no case shall this subsection require."

Now you see Congress in writing this Act in all other cases when they were confining it to the particular section or subsection used that specific language, showing that they meant to confine the language to exactly that.

Now here is the conclusion of the Act. It is not made separate from (m). It might be. Parts of this, it seems to me, could very well be separated; I mean other parts of the Act; but I think Congress having used specific language, language sufficiently comprehensive to give this jurisdiction, you should not rely upon the inference deduced from the fact that the words "the provisions hereof" are used, in view of the fact throughout the rest [79] of the Act when Congress was referring to a section or a particular subsection they used that language.

Mr. Skulason: May I make one more remark, your Honor.

Regarding this point that the authority of the Court is restricted to matters it mentions specifically in section (m), there appears on page 8 of the memorandum served on us, which of course we never saw until this morning, a quotation from an

opinion by Thomas I. Emerson, Attorney and Deputy Administrator for Enforcement, and so forth, relating to section (m), and there are two portions of that opinion that might be considered somewhat contradictory. I will call attention to both of them.

First, "Section 2 (m) does not apply so as to allow declaratory judgment review of the suspension orders." Of course that is not what this is. "Our position is that the exclusive method for court review of suspension orders is the injunctive review provided by section 205 (g)."

But lower down he quotes from this subsection (m):

"The language used, 'to determine whether any such action or failure to act is in conformity with the provisions hereof and otherwise lawful,'" underscoring those words, "'is broad enough to permit the raising of every issue of validity, both under the statute and the Constitution'."

He took our view there. By "under the statute" it seems to me he means the entire statute, not just (m). So I think if that is taken as a valid and good opinion that disposes of that [80] point.

(Mr. Wagner here stood.)

The Court: It is time to quit now. I have to take up other matters. I will hear you, though. You haven't spoken.

Mr. Wagner: Yes. I have just one or two remarks to make, your Honor, in connection with 2 (m), in reply to Mr. Henderson's remarks.

It seems very important to me that Section 2 (m) makes absolutely no mention of any language that would indicate the intent of that section to repeal or modify any other section of the Act as it existed from the pre-existing Act. Clearly the two sections, the exclusive jurisdiction section and Section 2 (m), if read or interpreted as counsel contends, would be entirely inconsistent. It seems to me that that is a very important thing to note.

The Court: Well, that happens all the time, Mr. Wagner. That is not unusual in modern legislation. That is why probably seventy-five percent of the cases the courts deal with are in statutory construction.

Mr. Wagner: Well, to me it seemed quite important. In connection with Mr. Skulason's remarks the words "otherwise lawful," as contained in Section 2(m) clearly pertain to the penalties or conditions and the imposition of those conditions or penalties in four particular situations, or the three particular situations that we have enumerated here in the memorandum the other day. [81] "Unlawful" clearly indicates that those conditions or penalties are the ones that are being referred to, and are the only ones to be considered in the jurisdiction that is conferred in Section 2 (m).

The Court: I won't undertake to pass on the jurisdictional question now, but reserving that question I will hear you on your grievances at 1:30, if you are ready to present testimony at 1:30, reserving the jurisdictional question.

Mr. Skulason: Yes, your Honor. We will be ready at 1:30.

The Court: I want to ask you a question, Mr. Cannon. Look at page 8 of the brief, in Mr. Emerson's opinion.

Mr. Cannon: Yes.

The Court: Pretty well up there: "Our position is that the exclusive method for court review of suspension orders is the injunctive review provided by section 205 (g)."

Mr. Cannon: Yes. That is suspension.

The Court: You cited 205 (e) a while ago.

Mr. Cannon: 205 (g) has nothing to do with this.

The Court: Did you cite 205 (e) a while ago?

Mr. Cannon: No, your Honor. The section I referred to——

The Court: Were you talking about this (g)?

Mr. Cannon: I was talking about 204 (e).

The Court: 204 (e)?

Mr. Cannon: Yes, 204 (e). That was in connection with the situations in which stays can be granted. [82]

The Court: Yes. This is something else again?

Mr. Cannon: Yes. That has nothing to do with this situation. 205 (g) deals with suspension orders which are not involved here.

The Court: I thought 204 (e) also deals with suspension orders.

Mr. Cannon: No, your Honor. 204 (e) only deals with situations in which stays can be granted in similar criminal cases.

The Court: Is 205 (g) a new amendment?

Mr. Wagner: Your Honor, that is the one that was involved in the Cain case, which Mr. Snow, Mr. Cannon and myself presented.

The Court: Wait. That doesn't mean anything to me. All I want to know is, is 205 (g) new legislation?

Mr. Cannon: That is correct, your Honor.

The Court: That is, there were several amendments in June of this year which relaxed the prior rigid rule that the Federal District Courts had no jurisdiction?

Mr. Cannon: Absolutely not, your Honor. In my opinion 205 (g), as such, made it even—imposed more rigid requirements than heretofore. That is perfectly clear by our admission in the Supreme Court case of Bowles vs. Stewart, that the District Courts had jurisdiction anyway to review the validity of suspension orders. That is an entirely different problem than in this case.

The Court: You never claimed that was covered by the part of the Act that created the Emergency Court of Appeals.

Mr. Cannon: Your Honor, it was not covered by the Act, but we always admitted the District Courts had jurisdiction to pass upon [83] the validity of suspension orders, once the administrative remedy had been exhausted, and section 205 (g), in our opinion, does nothing more than to put specifically in the Act that which we had already admitted as a fact, and the Supreme Court in the Stewart case points out that the Administrator ad-

mits even before it did have jurisdiction in that case.

The Court: All right. 1:30.

(Thereupon, at 10:03 o'clock A. M., a recess herein was taken until 1:30 o'clock P. M. of this day, Friday, October 6, 1944, at which time Court reconvened and the following further proceedings were had herein:)

Mr. Cannon: May it please the Court, your Honor, before the proceedings starts, for the purposes of the record, in the case of Northwest Poultry and Dairy Products Company against Chester Bowles, Cecelia P. Gallagher and Franz Wagner, Civil No. 2575, I respectfully request that a certain portion of our brief, namely, the portion on page 8, beginning with the reference to a memorandum of Thomas I. Emerson be deleted from the memorandum, inasmuch as it was put in through mistake as to its effectiveness. I feel it is unfair for us to attempt to rely on what purports to be an individual opinion of Thomas I. Emerson in regard to a particular section. That is not an official interpretation, and does not purport to be, of the regulation. The remarks in there are only [84] a portion of a large discussion which related to confidential matter between Office of Price Administration attorneys the week after the new amendments came into effect, and so, consequently, I wanted to explain that to the Court precisely, that we do not rely on that language of Mr. Emerson's memorandum and re-

quest that it be withdrawn for the purpose of the record from our memorandum.

The Court: Call a witness, Mr. Skulason.

Mr. Cannon: Your Honor, I might say one other thing—excuse me for interrupting, please. As I understand it, also for the purpose of the record, the hearing this afternoon is for the purpose of taking testimony and hearing arguments on the validity or invalidity of the various orders in question here. I take it that is correct, is it not? And in that regard, before the beginning of the proceedings I want to state our position for the record, namely, that we feel that clearly under the provisions of the Price Control Act which were discussed this morning the Court has no jurisdiction to consider the validity or the invalidity of the particular orders; consequently, further than that, as to whether those orders are in themselves valid or invalid would depend to some extent as to whether or not they were generally fair and equitable, so to speak, insofar as a number of people are concerned, and would raise many, many problems, which I am not qualified or prepared to argue in this particular case, and I have discussed this matter carefully with our National Director of Litigation and we are taking the position that the exclusive jurisdiction [85] provision is here applicable, and, consequently, we will not offer any evidence whatsoever as to the validity of the orders in question.

Now I might say this, too, so that there can be no misunderstanding. It certainly is our position

that the orders are, as such, valid; were issued after due consideration by the people who did issue them; the statements of considerations in connection therewith indicate that they were given careful consideration; that members of the trade were consulted and that the whole purpose of these orders was to alleviate a shortage condition and to make the prices more fair and equitable. However, with that statement I rest our position in this matter entirely on the fact that this Court has no jurisdiction to pass upon the validity of the order.

Mr. Skulason: Mr. Norton, please.

C. W. NORTON

was thereupon produced as a witness in behalf of Respondents in Civil No. 2565 and the Plaintiff in Civil No. 2575 and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Skulason:

Q. Will you state your name, please?

A. C. W. Norton.

Q. Where do you reside?

A. Portland, Oregon.

Q. How long have you lived here?

A. Since 1932. [86]

Q. And what is your connection with the Northwest Poultry and Dairy Products Company?

A. I am the president and general manager.

Q. How long have you been so connected?

(Testimony of C. W. Norton.)

A. Ever since I came to Portland, twelve years—twelve years the first of June.

Q. How long has that corporation been operating here? A. It started in 1929.

Q. And where is its place of business in Portland? A. On 3rd and East Oak.

Q. What sort of a plant have you there?

A. We have a four-story and full basement concrete building that takes in approximately a quarter of a block.

Q. Have you branches?

A. Yes, sir. We have six branches in the country, six country branches.

Q. Tell us where they are, please.

Mr. Cannon: Excuse me. Your Honor, for the purpose of the record, I object to these questions, and particularly that question, as being incompetent, irrelevant and immaterial. And also may it be deemed, counsel, so I won't have to continually object——

Mr. Skulason: Certainly.

Mr. Cannon: ——that all the questions you ask are being asked subject to that objection?

Mr. Skulason: That will be entirely satisfactory. [87]

The Court: The answers are taken subject to the objection.

A. We have plants in Salem, Albany, Eugene, Roseburg, Redmond and McMinnville, in addition to the Portland plant.

Q. You handle turkeys?

(Testimony of C. W. Norton.)

A. Yes. We handle turkeys as one of our main endeavors.

Q. You have been handling turkeys for some years past?

A. Approximately thirty years. I was with the Heningsen organization about fifteen years and with the present company about that same length of time.

Q. So you were in that same business before the passage of the Emergency Price Control Act?

A. Yes, I was.

Q. About the volume of your turkey business, Mr. Norton, per year, what can you tell us?

A. The volume of turkeys in Oregon has grown, and of course our volume has grown with it. In 1932 the volume was approximately \$1,100,000.00. That was the size of the crop. The volume has been increasing about a million dollars a year. At the present time it amounts to \$14,000,000.00. Out of that ordinarily we will handle about \$4,000,000.00. That is based on last year—\$4,000,000.00 of turkeys to about \$4,000,000.00 of allied products, feed and eggs, and so forth.

Q. That will be the amount handled by your main plant and the branches?

A. That is correct. [88]

Q. In pounds can you tell the Court what the volume of the business is?

A. In the State of Oregon the poundage is approximately 35,000,000. In the United States it is approximately 540,000,000.

(Testimony of C. W. Norton.)

Q. And what portion of the business in pounds do you handle in Oregon?

A. Close onto a third normally.

Q. How long have you been handling approximately that quantity?

A. Well, as I say, it has been increasing as the turkey volume increased in the state.

Q. About a million pounds a year or——

A. About a million dollars a year it has been increasing and we handle our share of it.

Q. Are there other people or concerns in this state handling turkeys on the same basis as you handle them?

A. Yes. There are several large firms here in the state that handle on the same basis which we do.

Q. Is the business being handled by cooperatives at all?

A. Yes. There is one—in fact, there are three cooperatives in the state. They are all under one head; that is, their combined sales organization is under one head.

Q. What is the name of that?

A. One sales organization? That is the Northwestern Turkey Growers Association.

Q. Their headquarters? [89]

A. Salt Lake City.

Q. About what proportion in pounds do the cooperatives handle here?

A. My understanding is that they handle in the neighborhood of four million pounds.

(Testimony of C. W. Norton.)

Q. And reducing that to dollars, what would that come to?

A. Well, on the present basis it would be about \$1,600,000.00.

Q. Now have you been familiar, Mr. Norton, with the manner in which this turkey business has been conducted by your concern and others in the same line in this state for several years last past?

A. Yes.

Q. I mean as to practice, business practices and cost practices and methods, you are familiar, are you?

A. Yes, I am.

Q. You claim to be a wholesaler and processor and purchaser of turkeys?

A. Yes. We operate right through from the grower to the consumer or to the wholesaler.

Q. Now will you please explain to us what the custom of handling turkeys has been here for many years, and was before this Act that I mentioned came into operation.

A. Well, in 1932 the majority of the turkeys, as I say, there was only one million one hundred thousand pounds, or one million one hundred thousand dollars produced, and the majority of the turkeys in that year were dressed by the growers. They were used for home consumption, or nearby, and the growers at the holiday season [90] would dress their own birds and bring them in, and as the volume increased the customary practice became for the dealer-processor, wholesaler-processor to put in country plants and process the turkeys

(Testimony of C. W. Norton.)

for the growers, and since 1934 fully ninety percent or more of the turkeys that have been killed and processed have been in processing plants. The processing plants, incidentally, are owned by the wholesalers in this district, either in Oregon or Washington in this particular territory.

Q. Yes. Now in this Order G-93 that we are attacking here there is a provision for the charges on a kill-and-haul basis, you recall. State what the custom in the trade was with reference to that feature.

A. The custom ever since the processors and wholesalers started to dressing turkeys has been to buy the turkeys from the growers on the dressed weight and grade, and charging the growers for the service, picking and/or hauling, whichever the case may be, or both. If the grower hauled his own turkeys in you wouldn't charge him for the hauling. If you hauled them in for him, you would charge him both for the hauling and dressing.

Q. Was that on a per head basis?

A. The hauling and dressing was all on a per head basis.

Q. Now was that the only basis on which turkeys were being handled before this Act and these regulations came into effect?

A. That is the only one that turkeys have ever been handled on in Oregon since they have been processed. [91]

Q. The per head basis?

A. The per head basis.

(Testimony of C. W. Norton.)

Q. And what was the charge in the trade for that?

A. Well, formerly it was as low as 18 to 20 cents, but at the time that the OPA regulations came in we were charging 23 on hens and 25 on toms as a complete job.

Mr. Cannon: May I state also for the record, there are a number of questions and answers which are not proper under the rules of evidence, even assuming that your Honor did have jurisdiction to consider the validity of the regulations but for the purpose of expediency here I am not objecting to those questions and answers.

Mr. Skulason: What is the last question and answer?

The Witness: The total charge for picking and hauling at the time.

Mr. Skulason: Yes; was so much?

The Witness: So much per head.

Mr. Skulason: Yes.

Q. Was that the situation in 1942, when the OPA regulation came in? A. Yes.

Q. What, if any, regulation was then issued regarding that, or was there any?

A. Well, at the time that the OPA came in, as I say, we were charging 23 and 25 cents, and later on in the year, or early last fall, there was a regulation come out that we could not buy dressed turkeys that we had processed for the growers, that we had to buy[92] them on a live basis, and after quite a little discussion back and forth Washington

(Testimony of C. W. Norton.)

finally ruled that we could continue to buy on a—to buy dressed turkeys that we had processed, and providing we didn't exceed the dressed turkey ceiling. That was straightened out on the 24th of last November.

Q. So you went on then on that basis?

A. That is correct.

Q. Then was there some regulation made as to the per head charge later?

A. Previous to that we had—several of the dealers in the state had raised the per head charge from 23 cents on hens up to 25 cents, and from 25 on toms to 28.

Q. Had you done that?

A. Yes; we had in some plants.

Q. When did you do that?

A. That was in—I believe it was last November.

Q. And carried on at that figure for some time?

A. Carried on for a period of two or three weeks.

Q. Then what happened?

A. An investigator for the OPA came in and stated we were under violation for a pick-and-haul charge and said we must return to our former charge and make a voluntary—rather, we had to pay the Treasurer of the United States the amount of the alleged overcharges we had made.

Q. Was that amount ascertained in the case of your company? [93]

A. Yes. It was figured at so much per head on the birds that we had hauled at the higher

(Testimony of C. W. Norton.)

charge, picked and hauled at the higher charge at three of our plants.

Q. And you paid a fine, did you?

A. We paid the fine, yes, sir.

Q. How much?

A. I believe it was \$220 and some odd cents.

Q. Yes.

A. But the other dealers in the state, the majority of them also paid fines right along with us.

Q. Up to this time as far as we have gone now, you were on the per head basis, weren't you?

A. On the per head basis. That is the only way we have ever been.

Q. And did you proceed then on that basis for some time after this regulation came?

A. We proceeded on that basis. In fact, that is the basis we proceeded on all through the year. However, there was another order out that was contemplated, changing that to a per pound basis.

Q. You refer now, don't you, to the order of—

A. G-93.

Q. G-93? A. I do.

Q. Well, that was issued on the 2nd of May, I believe, and effective on the 8th of May, wasn't it?

[94]

A. I believe that is right. Yes.

Q. This year? A. 8th of May.

Q. In what manner did that order come to your notice?

A. Well, we were sent a copy of the order itself, mailed a copy of the order itself. The order wasn't

(Testimony of C. W. Norton.)

dated. Then later on we received an interpretation of the order.

Q. That is, you are familiar with the plaintiff's, that is our Exhibit B, isn't it?

A. That is correct.

Q. B, I should say? A. That is correct.

Q. Yes. Now Mr. Norton, when that came in what, if anything, did you try to do about it?

A. Well, it so happens that I am on the National Advisory Board of the OPA in Washington, and immediately they began to see that if it could not be straightened out so it would not disrupt the entire industries in the States of Oregon and Washington, and we have been working on that basis ever since. We have been trying to get an interpretation.

Q. When you say "We," who do you mean?

A. Well, our company and other dealers in this district—other dealers and growers.

Q. Now you recall the provisions, of course, of that order providing for the pick-and-haul charge on a per head basis? [95] A. I do.

Q. And for loose turkeys on a per pound basis?

A. That is correct.

Q. Yes. Now what is your criticism of that feature that I have just now mentioned?

A. Well, the order sets up a pick-and-haul charge—kill-and-haul, it calls it—of 30 cents on hens and 35 cents on toms. The interpretation that came out says that you cannot use that as your

(Testimony of C. W. Norton.)

method of deduction, if you have coolers; that if you do have a cooler you must charge on a per pound basis. Now the 30 cents per pound on hens, figuring our average hens in Oregon they are fifteen pounds, it would be 2 cents a pound. On the per pound basis it sets up $31\frac{1}{2}$ cents a pound. In other words, it is a cent and a half higher if you have a cooler in your plant. Whether you cool them outdoors or not wouldn't make any difference. If you have a cooler, according to the ruling, you would have to charge an extra cent and a half. On toms it sets up a basis of 35 cents or 3 cents a pound if you had a cooler, and the difference between what we were charging the growers, taking our basis, and what the OPA made us go back to after we had raised, of 23, and the average of hen turkeys of 15 pounds at $31\frac{1}{2}$ cents a pound would be $52\frac{1}{2}$ cents. In other words, we would have to raise our service charge to the growers the amount of $29\frac{1}{2}$ cents. In the case of toms it was much higher. Toms will average—at that time toms would average 24 pounds. Three cents a pound on [96] a tom would be 72 cents. We had been charging 25, so there would be a raise of 40 cents a head, so far as the grower is concerned, on taking a tom.

Q. Mr. Norton, to help us all understand this, would you take the case of a turkey of a certain weight and give us the figures and the results, and the difference between the former price and the one required by this order.

(Testimony of C. W. Norton.)

A. Well, it is more easily done strictly by the pound basis, per pound.

Q. Very well.

A. I mean the charge—the charge per head. If you are charging 30 cents a head for an item and for any reason you would be compelled to charge 52½ for that item it would be 29½ cents difference.

Q. Let's take a turkey.

A. Well, a 15-pound turkey, that would be 2 cents a pound.

Q. What would be the difference?

A. The difference between what we had been charging and what the regulation said that we should charge would be 2 cents a pound on that particular item, a 15-pound hen.

Q. That would be the excess over what you were charging that you would have to charge the consumer?

A. That would be in excess of what we had charged for the past year.

Q. And what do you claim now as to the effect of that on your business? [97]

A. Well, the natural effect is, the growers—in the first place may I explain to the Judge, there is an embargo on turkeys and there has been an embargo on turkeys since a year ago in July, with the exception of a very few months, and were it not for the embargo the growers would undoubtedly pool together or make some arrangements to dress their own turkeys. In addition to that, the cooperatives

(Testimony of C. W. Norton.)

that are in question, or that are operating, are allowed to pay a patronage dividend, so it does not affect them. They can pay this money back and they are going out to their growers on the basis that they can refund and asking them to sign up to join the cooperative on that basis. They have covered the territory pretty well about that.

Q. And the effect on your business would be what?

A. We would not have the turkeys to handle or to dress, either. It would be taken out of our hands.

Q. Have you been disposing of your turkeys to the Government for some time?

A. All of the turkeys since last July, with the exception of a few months, there is an embargo that they must all go to the armed forces. At the present time there is a strict embargo. There can't be a pound sold outside of that—their care; and that has been on, in fact, that order was on when this G-93 came into existence. We were compelled at that time to sell to the army and the growers were compelled to sell through a licensed dealer.

Q. Now has this order had any practical effect in the matter of [98] producing turkeys, shall we say harvesting turkeys, processing them and delivering them to the Government?

A. Since last May it has been in the shape it is now. The growers are simply holding back. They don't want to sell. In the meantime the war pool

(Testimony of C. W. Norton.)

is right on our heads trying to get turkeys for our armed forces. If we are going to have to feed them overseas we have to get turkeys and since this order has been in effect, May 8th, there has been nothing but confusion among everyone, dealers and growers alike.

Q. Speaking of confusion, do you mean among your dealers or all of the dealers?

A. All of the dealers.

Q. Throughout the state?

A. Throughout the state.

Q. Excepting the cooperatives?

A. Excepting the cooperatives.

Q. This last order applies to Washington and Oregon, except in the matter of accounting. What do you know of the effect of it on the State of Washington?

A. Washington men have given us information—they have operated their turkeys up in Washington the same as Oregon has—that they are not getting the turkeys. They are not dressing.

Q. Is there a time, Mr. Norton, in the life of a turkey when the turkey is peculiarly fit for processing and food? Is there such a thing as a ripening period for turkeys? [99]

A. Under the present feeding programs turkeys have a certain peak and that peak on toms will come at approximately twenty-six weeks and on hens it will come at approximately twenty-four weeks. If they go past that period they go downhill, the same

(Testimony of C. W. Norton.)

as an apple on the tree or anything else. There is a ripe period, and not only from a price standpoint but from a food standpoint.

Q. And that is how that is right now?

A. That is the way it is right now.

Q. From now on, unless you can process them and get them into channels of trade, they begin to deteriorate?

A. They begin to deteriorate, and in the meantime the army is not going to have their birds.

Q. As one in this business, with all of your experience, a member of the board and all of that, how do you look upon this situation, Mr. Norton?

A. Well, it is unbelievable to me that an order of that kind could possibly come out where it sets a minimum charge that we had to charge a grower; setting up a price in excess of what it cost us to do that job, was beyond me. I still can't believe that an order of that kind could come out.

Q. Can you tell us what it costs you to do the job?

A. Our average charge of the picking and hauling—we have been keeping the records here for some time and our average charge of the pick and haul will run from 24 to 26 cents per head.

Q. Have you computed that recently, Mr. Norton? [100]

A. Yes, I have. I have two plants that computed it.

Q. You gave me I think an analysis of it this morning?

A. Yes, I did.

(Testimony of C. W. Norton.)

Mr. Skulason: Your Honor, may the bailiff hand the witness this, please.

(Paper passed to the witness.)

Q. What have you there, Mr. Norton?

A. This is the cost figures at our Portland plant.

Q. Would you kindly read some figures into the record illustrating what you are claiming.

A. September 22 the kill-and-haul charge, including the dressing, hauling, depreciation and rent, power and water, amounted to 23.37 per head; September 25th it was 18.52 per head; September 26 it was 27.68 per head; September 27th it was 23.19; September 28th it was 23.60, on a definite amount of turkeys.

Mr. Skulason: We will offer that in evidence and ask that it be marked, your Honor.

The Court: Admitted.

The Witness: You have the McMinnville plant there, too, if you want it.

Mr. Cannon: I object to that specifically on the ground it is incompetent, irrelevant and immaterial; this Court has no jurisdiction; on the ground, even if the Court did have jurisdiction I submit the validity of the order would still be incompetent, irrelevant and immaterial. [101]

The Court: It will be admitted, subject to the objection.

(The statement so offered and received, headed "Picking and Hauling Costs at Portland", was thereupon marked Plaintiff's Exhibit 1.)

(Testimony of C. W. Norton.)

PLAINTIFF'S EXHIBIT No. 1

PICKING AND HAULING COSTS AT PORTLAND

Sept. 22, 1944

Hen turkeys	738	.30	\$221.40
Tom turkeys	41	.35	14.35
	<hr/>		<hr/>
	779		235.75

Dressing labor\$100.83

Hauling Charge 61.29

Depreciation & Rent 15.00

Power & Water 5.00

\$182.12 \$.2337 per head

Sept. 25, 1944

Hen turkeys	970	.30	\$291.00
Tom turkeys	16	.35	5.60
	<hr/>		<hr/>
	986		296.60

Dressing labor\$ 99.36

Hauling charge 63.35

Rent & Depreciation 15.00

Power & Water 5.00

182.71 \$.1852 per head

Sept. 26, 1944

Hen turkeys	198	.30	\$ 59.40
Tom turkeys	570	.35	199.50
	<hr/>		<hr/>
	768		258.90

Dressing labor\$ 99.37

Hauling charge 93.25

Rent & Depreciation 15.00

Power & Water 5.00

212.62 \$.2768 per head

(Testimony of C. W. Norton.)

Sept. 27, 1944

Hen turkeys	13	.30	\$ 3.90
Tom turkeys	795	.35	278.25
	<hr/>		<hr/>
	808		282.15

Dressing labor\$134.42

Hauling charge 32.96

Rent & Depreciation 15.00

Power & Water 5.00

187.38 \$.2319 per head

Sept. 28, 1944

Hen turkeys	512	.30	\$153.60
Tom turkeys	415	.35	145.25
	<hr/>		<hr/>
	927		298.85

Dressing labor\$118.48

Hauling charge 80.34

Rent & Depreciation 15.00

Power & Water..... 5.00

218.82 \$.2360 per head

Mr. Skulason: Q. Mr. Norton, have you given your time exclusively during several years last past to this business? A. Yes.

Q. It has been your sole business?

A. That is all the business I have had.

Q. You have given study to it? A. Yes.

Q. Its various features?

A. I have been in it all the way through, working from the bottom of it up.

(Testimony of C. W. Norton.)

Q. How long have you been on this National Board. A. About a year and a half.

Q. Now will you tell the Court, if you can, what reason, if any, exists for changing this processing charge from per head to a per pound basis, as you understand it? What reason is there, if any?

A. Well, I would not have any idea why they would wish to change it from a per head to a per pound basis, so far as the States of Oregon and Washington are concerned. As you understand, this order only applies to Oregon, Washington and California. It is not a national order; it is a regional order. In the State of California the majority of the turkeys are bought on a live basis and then all [102] through the States of Oregon and Washington they are on a dressed weight and grade basis, and why they would want to change it I don't know. I can't imagine.

Q. When this order came did you seek an interpretation of it from various sources?

A. Yes. I took it up with the local office; I took it up with the San Francisco office; then I took it up with our attorney in Washington and through the national office in Washington.

Q. There is an attorney for the OPA—let's call him that—in Washington, isn't there?

A. Yes. Mr. Eisenberg.

Q. What is his name?

A. Ernest Eisenberg.

Q. Did you take it up with him?

(Testimony of C. W. Norton.)

A. Yes. We took it up with him, and my attorney took it up with him in Washington.

Q. What is the name of your attorney in Washington? A. Marshall Diggs.

Q. And you did talk to the regional office in San Francisco, did you?

A. Yes, sir. I talked to the regional office in San Francisco and also the local office.

Q. Did you get any relief or satisfaction from these talks?

A. I could not get any satisfaction at the local or regional offices, or particularly the regional office, but in the Washington offices [103] we were put off a time or two due to the fact they were calling a meeting of the board in Chicago and we have had two meetings in Chicago since this order came in and we have been continually promised to get a revocation of this order.

Mr. Cannon: I move to strike that as hearsay.

The Court: The motion is denied.

Mr. Skulason: Q. Was there a demand made on you for an inspection of your books of account?

A. Yes, there was.

Q. And what response did you make to that?

A. I told them that I had it up with the local attorney here and with the Washington attorney and we were expecting a ruling in regards to the order, and I asked them to wait until we could get such a ruling.

Q. Did you ever refuse outright to let the accounts and books be examined?

(Testimony of C. W. Norton.)

A. No, I did not.

Q. And there was a meeting, was there, of the Board in Chicago on September 9th?

A. There was.

Q. Was this matter considered then?

A. Yes. We had two meetings on it in Chicago.

Q. Was there any conclusion reached as to this order G-93?

A. Waldo Haldeman, who is the head of the OPA in Washington of this particular division, and Ernest Eisenberg was there, and also our [104] attorney, Marshall Diggs, and three Pacific Coast wholesalers or processors that also attended the meeting, and the head of the OPA office in Chicago was also there, and they promised that there would be some ruling out on it that would clarify it, as he said, by the time we got home.

Q. Has it come?

A. It hasn't, only in this—there is a new ruling out that perhaps will clarify it.

Q. What do you refer to?

A. They are going to—I understand, the last wire that I have, they will allow the wholesaler-processor to act as an agent for the grower in order to get around this particular provision.

Q. Now what will be the actual operation of that?

A. In that way we could be competitive with the cooperatives and can return to the growers the amount that they are entitled to under the order.

(Testimony of C. W. Norton.)

Q. By whom is that action being taken?

A. By the Washington, D. C., office.

Q. What evidence have you of that?

A. I have a wire.

Q. Do you have the order? A. Yes.

Q. Will you produce it, please?

(Witness produced paper.)

Mr. Skulason: Mr. Bailiff, will you kindly hand this back to [105] the witness.

Q. Mr. Norton, is that telegram what you referred to in relation to that recent order?

A. Yes, signed by Byron Cisco. Byron Cisco is an associate of Marshall Diggs, and he received this from the OPA last night.

Mr. Skulason: Your Honor, may I have the witness read it? It is brief.

The Court: Yes.

Mr. Skulason: Q. Read it please.

The Court: Would you like it read?

Mr. Skulason: Yes.

A. "OPA permits agent to sell turkeys to Government agencies for account of any grower or processor at permitted ceiling price for such sales and return to owner any amount not greater than that which owner could himself have obtained. Fee which agent may charge is limited to that permitted by Service Regulation No. 165."

Mr. Skulason: I offer that in evidence, your Honor.

The Court: It is admitted.

(The telegram from Byron Cisco to North-

(Testimony of C. W. Norton.)

west Dairy and Produce, so offered and received, was marked Plaintiff's Exhibit 2.)

PLAINTIFF'S EXHIBIT No. 2

(Western Union Telegram)

WUAD 250 54 Collect — TDW Chevychase Md 5
630P 1944 Oct

(Western Union Telegram)

Northwestdairy and Produce:

OPA Permits Agent To Sell Turkeys To Government Agencies For Account Of Any Grower Or Processor At Permitted Ceiling Price For Such Sales And Return To Owner Any Amount Not Greater Than That Which Owner Could Himself Have Obtained. Fee Which Agent May Charge Is Limited To That Permitted By Service Regulation #165—Byron Cisco.#165.408pt.

Mr. Skulason: Q. What does that mean now? What is this service regulation?

A. Service Regulation 165, my understanding is, is a regulation governing the services that you charge. It might be for grinding [106] grain. It is a service regulation. It is what you previously charged in a base period.

Q. Did you show me a letter this morning, Mr. Norton, concerning this matter?

A. Pardon?

Q. Did you show me a letter this morning concerning this matter? A. Yes, I did.

(Testimony of C. W. Norton.)

Q. Whom was that addressed to?

A. Mr. Perry.

Mr. Skulason: Mr. Perry May I have that letter, please?

(Letter passed by witness to Mr. Skulason.)

Mr. Skulason: That is a private letter, your Honor, which we don't want to use now.

Q. Mr. Norton, assuming now that this regulation is in force that you have been telling us about, where does that leave you as a processor and wholesaler and dealer in turkeys, in what position?

A. In a position of charging the growers more than we should charge for the dressing of his turkeys.

Q. But if you are allowed to return the excess——

A. If we are allowed to return the excess we will be on a footing with anyone else. We will be on the same basis as the cooperative and anyone else. We will be right back to where we were before this order came out, before G-93 here ever came into existence.

Q. And would that be, from your standpoint, fairly satisfactory and practical? [107]

A. This particular order, the order that is out now, pertains only to sales to the Government and, as you know, there is an embargo on now. We can't sell to anyone else. So it would answer the purpose at the present time, and after the embargo is lifted, which will be some time yet—I understand

(Testimony of C. W. Norton.)

the embargo will not be lifted until November 5th, and before it is lifted, at that time we must commit ourselves as to how many turkeys we will give the Government before they will lift the embargo for civilian trade for Thanksgiving. The Government wants sixty million pounds and they want them now.

Q. Notwithstanding this new order, are you still complaining about G-93? A. I am.

Q. Why?

A. Merely because we have to stay by our usual practices in the territory here of handling the turkeys for the growers and charging them on a per head basis. This is a temporary measure here that is coming up now of handling the turkeys for the Government. What will it be after the Government is through?

Q. Suppose this order G-93 should have been held to have been operative from May 8th to the time of the issuance of this order, would you still be in jeopardy? A. Yes.

Q. Why?

A. Because we have charged 30 cents for picking and hauling hens [108] and 35 cents for picking and hauling toms, which they say is in violation.

The Court: What will be the penalty?

Mr. Skulason: Yes. What will be the penalty, Mr. Norton?

A. According to the information they give out it will be a three-for-one; they could assess a three times penalty. On that basis it could be three times the difference between the 30 cents—it would be

(Testimony of C. W. Norton.)

three times 22½ cents, which would be 67½ cents a head for every turkey we dress, and in the case of toms it would be more.

The Court: I don't understand that.

Mr. Skulason: No. I will have him explain that.

Q. What you fear, what you are apprehensive about, is that you may be called on to pay damages?

The Court: If you charge more than the order or regulation you may be penalized three times. If you charge less what is the penalty?

A. They claim it is the same.

The Court: He says it is the same.

The Witness: The OPA says this is a minimum law.

Mr. Cannon: I move to strike that, your Honor, as heresay.

The Witness: We have the evidence, do we not?

Mr. Skulason: I will see if I can't elucidate that some, your Honor.

The Court: Let me ask you lawyers; you have got to be [109] specialists now, you and Mr. Henderson, in OPA cases: Do you know anything in the law that says there may be a charge of three times the amount less than the prescribed minimum?

Mr. Henderson: No, your Honor, but I know nothing in the law that says they may fix a minimum price, and if they do it——

(Testimony of C. W. Norton.)

The Court: One thing at a time. The only thing that has ever been cited to me in any case I have heard is the few sentences in the Price Control Act which say where anybody charges more than the maximum allowable he may be subjected, in the discretion of the Administrator, to a suit for three times the amount of the overcharge.

Mr. Henderson: That is right.

The Court: Is there anything else in the law?

Mr. Henderson: Not that I know of, your Honor.

The Court: Now then, somebody has told him that he could be penalized for charging less than the prescribed minimum—that he can be penalized three times. If that is in documentary form let's see that first. He says it is something somebody has told him.

Mr. Henderson: You can see what his apprehension is based on. If he sees they have made a regulation that relates to a minimum charge and that is not provided for by the law, I assume he has the right to assume they may do anything.

The Court: He says it is not an assumption. He says somebody told him. Now if it is in writing let's see it.

Mr. Skulason: Q. Now did you say somebody told you that? [110]

A. The interpretation of G-93 says that it is a violation of the law if you charge less than that price and it is a violation of the Price Control Act if you charge more.

(Testimony of C. W. Norton.)

Q. In other words, you must charge just so much?

A. You must charge just so much, according to the interpretation of the order.

The Court: All right. You still haven't made any progress.

Mr. Skulason: As to the consequences to him?

The Court: Right.

Mr. Skulason: Yes. Now then, we have been—let me get from him clearly what he has in mind, your Honor.

Q. You say you are apprehensive of certain consequences if this order G-93 is sustained as a valid regulation, Mr. Norton, and I think you said you were afraid you might be charged three times if you charge more than the maximum price. Now what else, if anything, have you in mind as to the consequences to your business?

The Court: Three times the minimum?

Mr. Skulason: Three times the minimum, yes.

A. The law sets up, as I understand the law it sets up a penalty for a violation of the law, and if it is a violation of the law and there is a penalty set up, the natural interpretation would be if you violated it below you would be in violation; if it is a minimum law you would be in violation below as well as you would be in violation if you are above.

Mr. Skulason: If the Court please, we are clear on the [111] interpretation placed on G-93 by Exhibit B, are we not? I pleaded that and I want to

(Testimony of C. W. Norton.)

be sure the Court gets our points there. If we may look at Exhibit B, the last paragraph in Exhibit B—and of course your Honor is familiar with the general provisions of the Act as to penalties and punishment, and here is what this respondent is up against. This is the interpretation.

The Court: Where are you reading now?

Mr. Skulason: On Page 1 of Exhibit B, the last paragraph. We have considered it and let's get it firmly in our mind; and this is what we claim is utterly unauthorized and utterly unreasonable:

"The above prices are the only prices"—and they underscore the word "only"—"which may be charged for processing services. Any charge of less than the prices fixed in this order will be considered an attempt to evade Revised Maximum Price Regulation 269. Charges of more than those prices would be in outright violation of this order."

Of course the consequences of violation are prescribed in the Act. Whether that can be reduced to an estimate in dollars and cents the penalties are there, imprisonment and fine, if he does not charge precisely these prices.

The Court: Well, let's talk lawyer talk now. I understand he is talking businessman's talk. This is on the OPA basis. I can understand about a fine and imprisonment, and I can understand about administrative suspension order, but he is saying that he thinks he is up against some penalties and damages, three times [112] something he thinks he is up against.

(Testimony of C. W. Norton.)

Mr. Skulason: Well, I suppose he would be. If he exceeded the maximum price of course he would be on that.

The Court: We can agree to that.

Mr. Skulason: They fix a price now and if he exceed it then of course the penalties come in.

The Court: Yes, but he is charging less.

Mr. Skulason: Well, what they have recited here, your Honor, is unknown to the law, so far as penalties are concerned—so far as penalties, either double or treble, are concerned. There is not in the law, so far as I know, anything about a minimum price and the consequences of violating a minimum price fixed.

The Court: That is why I asked.

Mr. Skulason: Isn't that the way you understand it, Mr. Henderson?

Mr. Henderson: Yes.

The Court: So, so far as you are advised as his counsel, you are in a position now to reassure Mr. Norton as to this thing, that as far as you know he would not be subject to treble penalty surely?

Mr. Skulason: He might go to jail, be fined.

The Court: I know how businessmen are. They take chances on jail oftentimes when they don't like to lose money. What was troubling him a moment ago was this treble penalty.

Mr. Skulason: Yes; I know he had that in mind.

The Court: Our discussion now has developed, so far as you and [113] Mr. Henderson are at pres-

(Testimony of C. W. Norton.)

ent advised—I won't say it is your position—he could not be subject to the treble penalty for doing what the OPA requires, for charging less than they prescribe.

Mr. Skulason: Yes. If he charged more, of course that would come in.

Q. Now there is a classification of turkeys as loose and boxed. In actual practical operation what does that mean?

A. Well, there are two different—there are two separate and distinct items. Kill and haul is the process of removing the feathers, and so forth. The loose turkeys, it is the handling of turkeys in loose form. Boxed, of course, is handling turkeys in boxed form. All Government turkeys must be boxed and there are certain price regulations set up for boxed turkeys and for loose turkeys in a wholesale way.

Q. Mr. Norton, if you were to operate under it—

The Court: Loose means unboxed?

A. That is right.

The Court: Unboxed?

A. Unboxed; loose.

Mr. Skulason: Yes, unboxed.

Q. If you were to operate under it would it have any effect upon the regular ordinary control and practice of your business?

A. I am not quite clear on the question.

Mr. Skulason: Read that to him.

The Court: He has answered that. [114]

(Testimony of C. W. Norton.)

Mr. Skulason: Q. Meaning it would disrupt and disorganize your business, would it?

A. That is correct.

Q. Now then, there came out one more order—apparently in the making of orders there is no end—known as G-3, didn't there?

A. Original order G-3.

Q. G-3, and it seems that came out on the 30th of August, last August. Tell the Court now what that provided from your practical point of view.

A. Well, in the national order, M.P.R. 269, it sets out a definition of wholesaler; it sets out a definition of a processor, and so forth, covering the United States. There was one exception on the national order—well, there is one or two exceptions, and one exception in the national order was in the description where the destination was quite great, that we be allowed 200 miles in which to operate and still operate as a wholesaler. It also gave us a list of accounts that could be sold to and still be classed as a wholesaler.

Q. You mean that was the situation before this?

A. Why, that is the national order. The regional order came out and cut the destination from 200 miles to 100 miles in which we could operate. It cut down to the amount—I mean, the number of accounts that we could sell to and still be classed as a wholesaler, and if for any reason they found that they could change our status to a processor from a wholesaler it would take away [115] the markup.

(Testimony of C. W. Norton.)

The markup as a wholesaler is a cent and a half a pound for civilian trade and in the case of the Government it is a cent a pound. However, in case of the Government either a processor or wholesaler can get the same price. In the case of sale to the civilian trade your cent and a half markup would be taken away, provided you could be classed as a processor. That cent and a half naturally would have to come out of the grower now, because we allow a cent and a half to operate on and if that was taken away, if we continue to operate we would have to pass it back to the grower.

Q. And the grower probably would not like that?

A. Growers don't like it, of course. They wouldn't.

Q. What is the effect of this reduction in the radius from 200 to 100 miles?

A. Well, out here 100 miles is not very far. We can't even service the Coast area of Hoquiam, or any of that district up through there, and can't serve a lot of the trade we have been in the practice of serving in the past.

Q. Did you complain and protest against this order?

A. We called a meeting a week before the order was to go into effect and asked for recommendations or criticisms—a meeting of dealers; also there were some growers present. We made our recommendations and made our criticisms, and when the

(Testimony of C. W. Norton.)

order came out it was verbatim to what it was when we first looked at it.

Q. When you speak of this meeting, by whom was that attended? [116]

A. It was called at the OPA office and attended by the dealers here in the city and some growers out in the county.

Q. How many about?

A. Oh, there was twelve, fifteen at that meeting. There was also a growers' meeting held. I think there were about seventy-five at the growers' meeting.

Q. Yes; representing about how many people in the trade?

A. The growers' meeting represented about 300,000 head of turkeys, the way I understood it.

Q. And you called attention to this very criticism you are making now?

A. That is correct.

Q. And got no relief?

A. No, we haven't. We didn't get any relief. However, the local office sent a list of the recommendations and criticisms to the regional office.

Q. By the way, reverting to the demand on you for the accounts and books, you may state whether or not you have endeavored to act in good faith throughout all these proceedings?

A. Well, we have worked as close as we possibly could with the local OPA offices here, and we have tried to interpret these different regulations

(Testimony of C. W. Norton.)

that have come out. We have been on friendly terms so far as the local OPA office is concerned.

Mr. Cannon: I move to strike that as a legal opinion of the witness. [117]

The Court: Motion denied. Miss Gallagher said the same thing the other day.

Mr. Cannon: I beg pardon?

The Court: Miss Gallagher said the same thing the other day, if I understood her.

Mr. Skulason: Q. How long have you been on the Board?

A. About a year and a half. That is, the National Board?

Q. Yes. A. About a year and a half.

Q. And state whether or not you have tried in every way to cooperate with the authorities?

A. Well, we held joint meetings, that is the same Board held joint meetings with the OPA and War Food Administration. Part of the time they were held in Washington, D. C., and part of the time in Chicago.

Mr. Cannon: The same objection.

The Court: The same ruling.

Mr. Skulason. Q. Have you tried to help instead of hinder in all of these matters of furnishing food to the military forces?

A. That is right. We are licensed operators to handle both turkeys and poultry so far as the armed forces are concerned.

Q. You are in thorough sympathy with what is attempted to be done—— A. I am.

(Testimony of C. W. Norton.)

Q. ———to advance the war effort?

A. I am. [118]

Q. Now there came still another order, I believe —yes—there came an amendment to G-93, didn't there?

A. Yes.

Q. On September 19th, 1944. Will you explain to the Court the practical operation of that?

A. Well, in practical operation it is a continuation of the original order. The only difference that it makes, it sets up—it has cut the margin of loose dress from $3\frac{1}{2}$ on hens to 2.8, and from 3 cents on toms to 2.8. It may have for both the same effect as for the services on the loose basis.

Q. It does away with the per head charge, does it?

A. It does away with the per head charge.

Q. And for the pick and haul it places that on a basis of 2.8 cents a pound?

A. For both hens and toms.

Q. It doesn't make any change in the loose charge?

A. No; for "loose" charge it is designated 2.8 on the loose basis. It has taken out the original category for haul, kill and haul, on the basis of the original order. That has been taken out.

Q. Has that helped any?

A. That has not helped a bit.

Q. Explain why.

A. As an illustration, 2.8 on toms against 3 is only one-fifth of a cent difference, which is actually not helping any. So far as the tom price is con-

(Testimony of C. W. Norton.)

cerned we are still way too high on the service [119] charge. We are still way too high on the service charge on hens. It is just lessened. It is a small fraction less than the other but it is a duplication of the original order.

Q. And there is still discrimination in favor of the cooperatives?

A. Yes. There is no attempt made to regulate the cooperatives in regard to patronage dividend—paying a patronage dividend.

Mr. Skulason: May I ask you one question, your Honor? This is something that the witness knows more about than we lawyers, I think, any of us.

Q. Is there some feature connected with this that I have omitted asking you about, Mr. Norton, that you would like to explain to the Court?

A. I would like to explain one thing. In talking to Washington yesterday in connection with this order that came out today allowing us to act as an agent, it is contemplated by the Washington office to allow us to return to the growers on an equal basis with the patronage dividend. That was taken up when we were in Chicago and my understanding is that within a few days we will be permitted to refund to the growers on a patronage dividend so that we can be competitors, owing to the seriousness of the turkey situation.

Mr. Cannon: I move to strike that as hearsay.

The Court: The motion is denied.

Mr. Cannon: Exception.

(Testimony of C. W. Norton.)

Mr. Skulason: Q. That is what you explained somewhat before. Now is there any other feature I haven't brought to your attention? [120]

A. Well, the only thing, in regards to this order we have been operating as we have for a period of better than twelve years and charging the growers in one way and to go back is certainly the wrong direction. We have been buying these turkeys on a dressed weight and grade and the majority of them have been bought under Government grades, and we have built the turkey industry up in the state to the point where it is the fourth state in the Union, so far as the production of turkeys is concerned, and certainly the grower is entitled to all that his efforts will bring and we don't need that extra money for processing and I can't see why we should not be continued to operate as we have in the past.

Q. In going to the grower now to buy his turkeys you of course would have to disclose to him what your processing charge would be under this order?

A. That is right.

Q. And the reaction of the grower is what?

A. Well, the reaction of the grower is that by us charging the 30 and 35 cents, they have, in a number of cases the OPA has contacted them direct and told them that they would be in violation the same as we if they accepted the service charge for less than what the order prescribed, and at the present time the growers are afraid to sell the turkeys.

(Testimony of C. W. Norton.)

They are afraid that they will be penalized. Our poultry is down at the present time. We are not dressing simply because the growers don't know what to do. They have been warned. They have been contacted in the country and [121] have been warned that they will be penalized if they sell to us.

Q. What evidence have you of that, that they have been warned?

A. We have letters to that effect.

Q. Have a witness here in this courtroom?

A. We have a witness in the courtroom, yes.

Q. And the damage to your business as a consequence of this, can you calculate it? Is it susceptible of computation?

A. Well, it will be pretty hard to calculate in this respect. Everyone is interested in the order, from the bankers that are financing turkeys. They are interested in the order. The county agents that are helping feed these turkeys are interested in it. The feed dealers are interested. Incidentally we manufacture and sell feed to growers. We also help finance turkeys. And this all depends on what the grower gets for his birds. Any little cost of a cent and a half a pound means whether the grower loses or whether he don't.

Q. Generally speaking, the effect on your business would be what?

A. It would naturally cut the production. It would take the turkeys out of our hands. We have seven plants built up for this kind of business, and

(Testimony of C. W. Norton.)

certainly the growers, as soon as they can get material to build plants of their own, will not pay that kind of money to get somebody to dress them for them.

Q. And you say the turkey business is the major portion of your business?

A. It is fully half. [122]

Mr. Skulason: You may cross examine.

Mr. Cannon: For the purpose of the record I renew my motion to strike all of Mr. Norton's testimony from the record on the ground it is incompetent, irrelevant and immaterial, the Court not having jurisdiction to pass upon the validity of the regulation and order under the exclusive jurisdiction provision, and also on the ground that the plaintiff herein has not exhausted its administrative remedy.

The Court: The motion is provisionally denied.

Mr. Cannon: Note an exception.

Cross Examination

By Mr. Cannon:

Q. Now Mr. Norton, I have just one question I would like to clear up, although I am not going into the validity. You have got a complaint which has been filed by you in the case of—in other words, this complaint in equity which was filed on your behalf. You are familiar with that complaint, I take it?

A. I have read it, yes. I couldn't quote it.

Q. I don't mean that.

(Testimony of C. W. Norton.)

A. I am familiar with it.

Q. You read it over to see if any portion of it was not correct before it was filed?

A. That is correct.

Q. When you read it over there was nothing in there which you thought was not correct? [123]

A. That is right.

Q. Now I refer your attention, Mr. Norton, to Paragraph XVII, Roman Numerals on page 7, which I will read to you. It reads, "The plaintiff", that is you, "has in good faith complied with the Emergency Price Control Act and with the regulations issued thereunder until the issuance of said order, Exhibit 'A'," and Exhibit A is——

A. What paragraph was that again, please?

Q. That is Paragraph XVII on page 7.

A. Seventeen on seven?

Q. "The Plaintiff has in good faith complied with the Emergency Price Control Act and with the regulations issued thereunder until the issuance of said order, Exhibit 'A', and since then has followed the practices theretofore established under said Act and regulations without change." Now I will ask you under that, Mr. Norton, do you mean that since Exhibit A has come out that you did not change your practices insofar as your payments and charges were concerned but continued to charge the same prices and pay the same charges that you did heretofore? Is that what you mean by that?

A. No. That went up at the time that this order

(Testimony of C. W. Norton.)

came out.

Mr. Cannon: Please just answer the question "Yes" or "No" first; then you can explain it.

The Witness: Will you put the question again, please?

Mr. Cannon: Will you read the question again, please, Mr. Reporter. [124]

(The last question was read.)

A. We have continued to——

Mr. Cannon: Now "Yes" or "No" to that.

Mr. Skulason: I submit that the witness may answer, your Honor.

Mr. Cannon: I submit the witness may first answer "Yes" or "No", then explain his answer.

The Court: Gentlemen, this is the way we all used to wrangle the first year we began to practice. I don't care whether he answer "Yes" or "No", or tells it his own way. I have got about an hour here to try to learn something about this complicated case, and the little niceties we have no way for. Can you answer that "Yes" or "No"?

A. I am afraid not.

The Court: Do you understand the question?

A. I think that I do, and yet——

The Court: How do you understand the question?

A. Well, my answer would be this: That we have continued to buy and dress turkeys on a per head basis and charge the growers on the per head basis for picking and hauling.

(Testimony of C. W. Norton.)

Mr. Cannon: Q. Well then, respecting what you have said, as I understand it you have continued your practices and charges that were in effect prior to the issuance of Exhibit A, the order which is Exhibit A?

A. Exhibit A—is that the G-93 order?

Mr. Skulason: That is the G-93.

The Court: You haven't observed G-93, in other words? [125]

A. We haven't observed G-93.

Mr. Cannon: Q. In connection with the request for your records, as I understand it from your testimony the investigator of the Office of Price Administration did come to you and request to see your books and records which were required to be kept by the order in question, and also served you with an administrative inspection requirement which directed you to permit the examination and copying of those records; that is correct, is it not?

A. We were served two papers, two of the requests. The first one was signed by McDannell Brown, I believe was the name here, and the last——

The Court: You admit that, don't you?

Mr. Skulason: Yes.

The Court: That is admitted.

Mr. Skulason: There is only one feature there. There wasn't any service really ever made. The papers were left there and we made no point on it. We came into court on the theory demand had been made.

(Testimony of C. W. Norton.)

The Court: Service it is admitted was made.

Mr. Cannon: Q. Then there was another inspection requirement served upon you signed by Chester Bowles; that is correct, is it not?

A. That is correct.

Q. Now did you, or did you not, turn over the records to the investigator pursuant to that inspection requirement? [126]

Mr. Skulason: Your Honor, we did not.

Mr. Cannon: Just a minute.

Mr. Skulason: Pardon me.

Mr. Cannon: I think it is fair to ask the witness.

The Court: Why do you have to ask him? Counsel admits he didn't.

Mr. Cannon: First he says he did not refuse to let them see the records, if the Reporter will read it.

The Court: Don't read that. Did you say at any time this afternoon—did you deny at any time this afternoon that you refused—I have got a double negative there. Did you ever let these people see your records?

A. I never let them see them.

The Court: No. You declined to let them see them?

A. No. I asked for time until I could get an interpretation of this order, either from the local office or the Washington, D. C., office, because we were in communication with that office every day.

The Court: But anyhow you didn't let them see your records? A. That is correct.

(Testimony of C. W. Norton.)

Mr. Skulason: We have said that all the time.

Mr. Cannon: Q. Now so also there could be no question about it, we are all here in court together, Mr. Norton, if there is any question that a demand was ever made upon you—and I take it now from the statements of your counsel there is no question there [127] was a demand made upon you for the production of your records, and there is no question that up to this time you have not permitted an inspection of your records required to be kept by the regulation by any agency of the Office of Price Administration; is that correct?

Mr. Henderson: He is asking for a legal conclusion. The man has stated the facts, if the Court please, whatever they constitute.

The Court: I find he has declined to let them see the records.

Mr. Henderson: That is correct.

Mr. Cannon: That is all.

(Witness excused.)

The Court: Now you have some testimony that is cumulative, I imagine?

Mr. Skulason: Well, I have something that is in just a little bit different category with one witness.

The Court: Put it off for the time being. I want to go over to your proceeding to require this man to let you see his records. You have a proceeding here, Miss Gallagher.

Miss Gallagher: Yes, your Honor.

The Court: Now I want your side of this where you are invoking my discretion to let you make your inspection. You haven't taken part in the other proceedings because you didn't concede jurisdiction in the other proceeding?

Miss Gallagher: That is correct. [128]

The Court: Now you are the moving party here. You are invoking my discretion.

Miss Gallagher: It is under section 202 (a), (b) and (e) of the act, the ones to which I referred the other day. Section (b) provides that "The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, to furnish any such information under oath or affirmation or otherwise, to make any keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations."

To carry out the provisions of section (b), section (e) requires that "In case of contumacy by, or refusal to obey a subpoena served upon, any person referred to in subsection (c)"—later language carries the same reference to subsection (b) which I have just read to you—"the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and

any failure to obey such order of the Court may be punished by such Court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b)”. So that the authority in the Court to issue an order requiring the [129] inspection, requiring the answering of a subpoena, also is given to the Court to issue an order requiring the inspection and copying of records. The same penalty for a failure to obey the order of the Court is provided in each case.

The Court: You want an order to see how many of these turkeys he has bought contrary to G-93?

Miss Gallagher: That is right, your Honor. We want to find out from whom he has bought the turkeys, to find out for sure that he has bought turkeys.

The Court: He has just told you.

Miss Gallagher: He testifies to that.

The Court: He just told you he bought turkeys contrary to G-93.

Miss Gallagher: Under our inspection requirement which we serve upon him we ask for inspection of the records required to be kept under M.P.R. 269, which is the General Poultry Regulation 2. What we are asking for is a look at the records he is required to keep under 269 and under G-93, in order to determine what he has bought turkeys for, what he has deducted for his processing charge, what he has sold turkeys for.

The Court: What do you mean, what he has sold turkeys for?

Miss Gallagher: He, in turn, after having bought and processed the turkeys from the farmer, has sold them then on to the Government, and those turkeys which have been rejected by the Army for being below the army grade he has been privileged at least to sell to the public. Without seeing his records we don't know that he has [130] sold to the public.

The Court: Well now, we have been talking so far about the charge for hauling and procesesing.

Miss Gallagher: That is right. That is one of our prime interests.

The Court: Yes.

Miss Gallagher: However, the interpretation which they have discussed says that a failure to deduct more—a failure to deduct the charges provided by G-93 are considered an evasion of M.P.R. 269. The whole picture is brought into this inspection requirement, because we want to look at his practice under M.P.R. 269, purchase and sale of turkeys, and under G-93, the processing of turkeys.

The Court: Now that is what you have to go into.

Miss Gallagher: I beg pardon?

The Court: That is what you have to go into. You will have to explain your side of it fully. I don't know that I will act at all, or not. I won't act until I understand your side of it, after full explanation. I understand about hauling and picking now.

Miss Gallagher: Well, you want a further explanation of that rule?

The Court: Yes. I want a lot of explanations. I want to know why you want to get into his books.

Miss Gallagher: All right.

The Court: What you think he may have done that is wrong. [131]

Miss Gallagher: Well, admittedly he has said in court today, and we have had it told us by hearsay otherwise, that he has failed and refused to follow the provisions of G-93.

The Court: That is what we have just been dealing with?

Miss Gallagher: Yes.

The Court: All right. Now go on to the other thing.

Miss Gallagher: All right. We want the evidence on that.

The Court: Go on to other things. I know that is discovery.

Miss Gallagher: Correct. When we get that evidence we also want to check through his records, particularly through his books and records of sales and purchases of turkeys to determine his compliance with the maximum price regulation 269, as well as the order G-93.

The Court: Well, don't mention G-93 any more, unless you have to.

Miss Gallagher: All right.

The Court: What may he have done, you think, in violation of 269?

Miss Gallagher: We don't know, your Honor. There are a number of things he might have done. We have no direct knowledge of what he has done

under 269. He has not, since the request, or since the first conversation with him, even allowed us to look at his records that he is required to keep by 269, so we don't know.

The Court: What is the relation, if any, between G-93 and 269?

Miss Gallagher: The relationship, as I explained before, his [132] refusal to deduct the proper charges under G-93 constitutes an evasion of 269 by returning to the grower a sum over the maximum price allowed to the grower under 269.

The Court: Well, give me an example. Be concrete now and specific. Just take a turkey and tell me what he may not have done.

Miss Gallagher: With reference to the example I just gave you, your Honor? An example of what I just stated to you?

The Court: Yes.

Miss Gallagher: If the ceiling price on turkeys is 42 cents per pound——

The Court: Forty-two?

Miss Gallagher: If it is. It may vary from place to place. Take that for an arbitrary figure.

The Court: To the grower?

Miss Gallagher: To the grower.

The Court: That is under 269?

Miss Gallagher: Yes, your Honor.

The Court: If you get tired you can sit down. Can you talk just as well sitting down?

Miss Gallagher: Yes.

The Court: All right. Lots of people can't.

Miss Gallagher: When I get into figures I always slow down a bit.

The Court: All right. [133]

Miss Gallagher: He is required to deduct from the 42-cent ceiling price which he pays to the grower a charge of 3 cents per pound for the processing.

The Court: That is what he is kicking about.

Miss Gallagher: Yes. That would return to the grower, then——

The Court: In other words, to state it the other way, he is required to charge him 3 cents a pound for processing?

Miss Gallagher: Yes. We will put it that way. He takes it out of what the grower gets.

The Court: Which he says is more than he has ever done before and more than it costs. That is what he claims.

Miss Gallagher: All right.

The Court: All right.

Miss Gallagher: The return to the grower, then, is 39 cents. If he charges only 2 cents——

The Court: That is what he has been doing. He has just told us that is what he has been doing.

Miss Gallagher: Yes. Then he returns to the grower 40 cents.

The Court: Yes. So the grower has more money than he is entitled to under 269?

Miss Gallagher: That is the theory. What we want, your Honor, is——

The Court: Now just keep going. I can understand a few simple things like this.

Miss Gallagher: Well, that is example of it.
[134]

The Court: All right. Now have you got something else that you want to find out?

Miss Gallagher: All right. If it should develop—I mean, this payment to the grower then of more than the ceiling price allowed to the grower is in violation on the part of Mr. Norton, because the regulation requires that neither purchases nor sales in the course of trade or business should be made over the maximum ceiling price.

The Court: Well, we know he has charged the grower less than G-93 prescribes. He has told us that. So, to use your figures, the grower gets 40 cents instead of 39. The grower has been paid more than he is entitled to?

Miss Gallagher: That is the way, your Honor, in which G-93 ties in to 269.

The Court: Now what is the next thing he may have done wrong? He has bought them from the grower and he has paid the grower more than OPA says the grower is entitled to be paid.

Miss Gallagher: Of course he may have sold it over the ceiling price.

The Court: Have you any evidence about that? Do you have any suspicion about that?

Miss Gallagher: I have no definite information of that, even of a suspicious character, where I would suspect a man unless I had opportunity to see first.

The Court: I will tell you, Miss Gallagher, when

you ask me [135] to let you into a man's books we have to have a frank talk, just like in discovery and many other proceedings that come before me. We have hundreds of them. If you have any suspicion he is doing anything else wrong, why, you will need to tell me about it. You don't know? You don't know whether he has been selling for more?

Miss Gallagher: I don't know, your Honor.

The Court: You don't know?

Miss Gallagher: But I would like to know whether he has or not.

The Court: Why would you like to know? He has already paid more for the turkeys than his competitors have. He has paid a cent more for them than his competitors have.

Miss Gallagher: He has paid more. It could follow——

The Court: You think he might try to get that cent back by selling over——

Miss Gallagher: Over the ceiling price.

The Court: —over the ceiling price, but you have no information of it?

Miss Gallagher: There is one other thing in which we are interested, to know whether or not—to know his conduct with turkeys which are rejected after the Army B inspection, called C grade, I think, or no grade. They are permitted—Mr. Norton and other processors—to sell those to the public. It is conceivable that Mr. Norton could have sold those to the public without showing the true grade of them, without showing it was a no-

grade or a C-grade [136] turkey and selling it at an A or a B grade price.

The Court: Any complaint been made to you that he has?

Miss Gallagher: No direct complaint from any individual. We have been requested by our regional office, and have been sent by our regional office the lists of all turkeys—the amounts of all the turkeys that have been rejected by the army, the processor who had them rejected, the grades of the rejected turkeys, and the request placed to check on those turkeys to see that they are being sold at the proper ceiling price.

The Court: And you have done that with his competitors?

Miss Gallagher: We have in a few instances; yes, your Honor.

The Court: Do you expect to do it generally?

Miss Gallagher: Yes, your Honor.

The Court: With the larger operators?

Miss Gallagher: Yes.

The Court: Have you met any opposition from them?

Miss Gallagher: Not at all.

The Court: Have you found any evasions?

Miss Gallagher: No evasions yet, your Honor. The rejections have not been very heavy so far in this fall season.

The Court: Now do you want to talk from your side?

Mr. Cannon: Your Honor, excuse me, might I say one word, since I am here?

The Court: Certainly.

Mr. Cannon: Unless counsel has any objection for the defendant [137] in this matter.

The Court: He won't have anything to do with it. You just get my permission.

Mr. Cannon: If your Honor has no objection I thank you, your Honor. I would like to say, so it will be perfectly clear what our position is, regardless of whether it is followed by your Honor. I think it is only fair that I give you the position we take in regard to the record-keeping provisions and the provisions which permit our inspection thereof. It is our position that under section 202 (b) of the Price Control Act as amended, that the Administrator may require the keeping of certain books and records containing certain information in regard to commodities upon which a ceiling price has been established and that the Administrator may require such person to permit of the inspection and copying of records and other documents.

Now it is our position that it is not necessary for the Administrator to have probable cause that the defendant may have violated the regulations prior to making a request upon the defendant for an examination of his records. Further, it is our position when application has been made under section 202 (e) to the District Court that it is not necessary for us to show your Honor facts which would lead your Honor to conclude that the defendant probably had violated the regulations.

The Court: That would be between you and me and the appellate court. [138]

Mr. Cannon: That is correct, but I wanted to make our position clear on it, your Honor. And I might say this, in fairness to your Honor: A question I consider almost identical has been decided by some District Courts, and our Circuit Court of Appeals, under other acts which have similar record-keeping provisions, and so far as I know the decisions have consistently held it is not necessary for the agency to make a showing of probable cause in connection with their application to permit examination of the records.

The Court: I might say to you that I want to do it in another way; that I would give you a subpoena duces tecum instead of turning you into a man's business.

Mr. Cannon: Well, your Honor, of course this application is an application to show cause why the defendant should not honor our inspection requirement which has been served upon him.

The Court: I know that is the way you started it.

Mr. Cannon: That is correct. And that is the motion which we made and which is now before your Honor.

The Court: But I might say when you came to me to ask me to act that I preferred that you get the information in a different way; that I didn't like contempt proceedings, for instance, which I don't. They are very poor statutes. And so, in other words, I might think there is a different way to skin the cat than you refer to at the particular moment.

Mr. Cannon: That is correct, your Honor, and whatever your Honor thinks is right and rules, of course that is naturally what we will [139] abide by, but I wanted to make our position clear, and I would like to point out, too, one other thing, so your Honor will have it in front of you. I am not sure your Honor has been made aware of this: That section 202 (b) is the section which requires that the records be kept, and also it provides that the Administrator may require the inspection and the copying of such records. Now section (e) relates to going into the District Court for an order requiring the inspection requirement of the Administrator to be honored, and provides the provisions of this subsection, that is (d), shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

Now the provisions of section 4 (a)—in other words, we have chosen to come into your Honor's court because the defendant has not honored the inspection requirements. The other alternative which is given to us by the Price Control Act is provided in section 4 (a), which says: "It shall be unlawful", and so forth, immaterial matter regarding contracts, and so forth, "for any person to violate any order or requirement under section 202 (b)". In other words, it is specifically made a violation of the Act for the defendant not to comply with the requirements of section 202 (b).

Now I state that in fairness to the defendant, in fairness to your Honor, that it is our position—

and we have so followed the practice in other cases—in some cases we go directly to our criminal remedy where there has been refusal to obey the subpoena. [140] In other instances we seek the aid of a District Court. In this situation we have sought the aid of your Honor under section 202(e).

The Court: What do you do in other cases?

Mr. Cannon: In some other cases we have brought criminal prosecutions for refusal to honor a subpoena under section 4 (a). In other words, section 4 (a) says it shall be unlawful to refuse the requirements under section 202 (b) and 202 (b) is the section which provides—

The Court: You don't bring them. You ask the United States Attorney to bring them.

Mr. Cannon: That is correct, your Honor. Excuse me for that. I mean they refer them to the United States Attorney. They bring them not as they see fit.

The Court: Yes.

Mr. Cannon: But they have been brought; I will say that, your Honor.

The Court: Yes.

Mr. Cannon: And the only other observation I have to make, your Honor—and I hope your Honor will take this the way I mean it, as far as that is concerned—I believe in the significance insofar as the urgency of this matter of price control is concerned. As the plaintiffs here have said, the turkey season now is in a very important stage, so far as that is concerned to them, and also to us from

the standpoint of compliance; and we feel that we will do everything possible to assist your Honor in an expeditious and [141] proper disposition of this matter, and we feel that the provisions of the Price Control Act which relate actually to the expedition of cases does mean something. It was put in the Act after some consideration by Congress. And, as I say again, your Honor, I know you will take this the way I mean it, but I think I would be neglectful in my duty if I did not point out what I feel to be a pertinent provision of the Price Control Act, provided in section 205 (c), that any court shall advance on the docket and expedite the disposition of any criminal or other proceeding brought before it under the Price Control Act; and a very recent decision of the Circuit Court of Appeals for the Tenth Circuit, which was referred to in our brief this morning, I think gives a very fair interpretation of what Congress meant insofar as that particular section is concerned. Just two brief paragraphs of that opinion I would like to read in closing, with your Honor's permission.

“Recognizing that ‘of all the consequences of war, except human slaughter, inflation is the most destructive’ the Congress by enactment of the Emergency Price Control Act, expressed its purpose to stabilize prices in order to prevent wartime inflation and its causes and effects, by maintaining existing price levels. To effectuate the declared congressional policy the Act created an office of price administration under the direction of a price admin-

istrator empowered to fix and establish 'generally fair and equitable prices' for rents and commodities by appropriate regulations. The constitutionality of the broad and comprehensive [142] powers thus delegated to the Administrator is no longer open to doubt''.

There are set forth several Supreme Court cases.

"The objectives of the Act cannot be served unless courts promptly perform the judicial functions enjoined upon them by the Act. If the hardships"—and I think this is important—"If the hardships recognized by the trial court"—and this is the trial court in this particular case—"as constituting the basis for a denial of the injunction are disproportionate to the common burden of a wartime economy the remedy is adequately provided elsewhere in the Act (the exclusive jurisdiction provision) and not in the trial court. The complexities of the problem involved in such a gigantic undertaking renders judicial administration inadequate and inappropriate. In our judgment the public interest fully justified injunctive relief in respect to the adjudicated violations and the case is reversed and remanded with directions to issue an injunction''.

Your Honor, I say now with great caution, you certainly understand me when I make this sort of an argument, but I do feel actually that cases such as that and the provisions of the statute, should in fairness be pointed out to your Honor, because it is part of our duty to do what we best can to bring about the best enforcement and to bring to the attention of your Honor all statutes and cases which

we feel are relevant, and upon that I submit our argument on the order to show cause. [143]

The Court: Now let's just pull this thing together a little bit. At the outset let me tell you that you would be surprised how many statutes there are which wind up by saying just what this price control statute says, that enforcement of this statute shall be on the conscience, day and night, of all the United States District Judges, and that they should give immediate attention to all cases brought under this statute and advance them on the calendar. There is a whole host of those, so this is not a new experience, as it happens.

In this particular case we had to wait for you to get up here; we could not act the other day; and we had to wait for Miss Gallagher to go to La Grande; so now we are all here, and there is more speed behind us rather than ahead of us.

Now you have a number of administrative powers under the Act. You have made a demand on this man and he has disregarded it, and you could suspend his license, couldn't you?

Mr. Cannon: No, your Honor. The only way we could do that would be, first to send him a warning notice, which would set forth his violations. Then if he violated again we would have to come into court in a suit to suspend his license.

The Court: You don't have any administrative disciplinary remedy?

Mr. Cannon: No, your Honor. That is only in connection with rationing violations that we have

a right to hold a hearing to determine if a fellow should be suspended. [144]

The Court: Your remedies are criminal prosecution and injunctive relief, and those two things?

Mr. Cannon: In this case it would be simply either criminal prosecution, or making an application to your Honor insofar as the disregard of the inspection order is concerned. In other words, we could not very well bring our injunction suit unless we brought it on certain facts.

The Court: That is what you are aiming for eventually, when you get into his books and get the details on his violations.

Mr. Cannon: Oh, eventually, yes, the ordinary remedies of the Act would be available to us, provided we found violations.

The Court: He has told you he has violated the regulation. There is nothing to debate about. He has told you he disregarded G-93.

Mr. Cannon: Yes. As far as that is concerned, it is like any other case. If the case fits into the remedies, whatever would seem proper under the circumstances.

The Court: Those remedies are two, criminal prosecution and injunctive relief.

Mr. Cannon: Criminal prosecution if the facts warranted it, but if he violated we would first send him notice——

The Court: Yes, which he has done in the past—which he says here he has done, as to which Mr. Skulason the other day emphasized the responsibility—I am speaking of him personally all the time,

although I mean his company—Mr. Skulason emphasized here the [145] other day the responsibility of the concern for anything it may have done in the past. What you want now is detailed information and then when you get that you would take three possible steps to get anything: prosecute the concern criminally, or you could come in here for injunctive relief, or you could proceed to suspend his license by judicial proceeding, or lastly——

Mr. Cannon: Treble damage if he charged over the ceiling price, perchance.

The Court: Yes; if he, in other words, tried to get this cent back from the Government. Now then, most of the turkeys have gone to the Government, haven't they?

Mr. Cannon: Yes, your Honor; and they still are.

The Court: That is a matter of public record, then, what has been paid for those.

Mr. Norton: If your Honor please, there is a one hundred percent embargo, and has been ever since this G-93 went in.

The Court: You had better put him on now or we will get into a bad fix. If you want to go into this any further you had better present to me what Mr. Norton wants to say, and if you want to put him on again you may do so..

Mr. Cannon: He has already said that, your Honor, when he was on the stand, in regard to the embargo on the turkeys.

The Court: Yes.

Mr. Skulason: It seems to me, your Honor, we have made that clear. [146]

The Court: All right. Well, he used the word "embargo". I get it now, what he meant, but I didn't fully understand it until now. All the turkeys have gone to the Government, then, haven't they, except the degrades?

Miss Gallagher: Except the rejects.

The Court: Except the degrades. So if he has charged, if he has tried to get this cent back, taking Miss Gallagher's case, continuing her example, why, it has been from the army and the navy, whoever pays for them, and that is a matter of public record, isn't it?

Mr. Skulason: Perhaps I had better call him for a question or two.

The Court: All right. I just want to make sure we are not tilting at a windmill here, as often happens.

C. W. NORTON

was thereupon recalled as a witness in behalf of respondents in Civil No. 2565 and the plaintiff in Civil No. 2575 and, having been previously sworn, further testified as follows:

Direct Examination

The Witness: Your Honor, I would like to explain how this operates. The War Food Administration puts an embargo upon killing for 100 per cent of the turkeys to be delivered or sold to the

(Testimony of C. W. Norton.)

Quartermaster's Market Center or the headquarters of the Quartermaster Market Center at Chicago. Then they have branches all over the United States. Then in conjunction with the OPA, the War Food and the OPA set the prices on these particular turkeys. When we [147] have turkeys to sell we call the Quartermaster Market Center in Seattle and they tell us the price to charge them out on. If they are export package we are allowed 21 cents a box for export box, 10 cents for strapping, and so on, but the Quartermaster Market Center gives us those figures. I want to explain one thing about the grade, your Honor, and that is under the OPA they recognize the U.S.D.A. system of grading. The Army does not recognize anybody's grading except the Army's. A bird might be an A grade turkey and yet not be suitable for the Army; it might be on account of cleanliness, it might be too many pin-feathers, it might pass one grade and not the other.

The Court: You sold those for what the Army told you they would pay you for them?

A. That is correct; and that is a matter of public record.

Mr. Cannon: For the purpose of the record, I object to the testimony as incompetent, irrelevant and immaterial, and also hearsay. May there be a ruling on that?

The Court: What?

Mr. Cannon: I say, for the purpose of the record I object to the testimony on the ground it is incom-

(Testimony of C. W. Norton.)

petent, irrelevant and immaterial, and also hearsay.

The Court: Yes.

Mr. Skulason: Q. I think perhaps we have had this. The situation right now regarding your output of turkeys and the Army's requirements is what? [148]

A. Where it stands, we can't do anything until we get this cleared up. The growers are afraid to sell to us.

Q. But your turkey output is all taken by the Government?

A. All taken. It is a hundred per cent embargo, and will be until at least November 5th.

The Court: Now Miss Gallagher, you shook your head a while ago, and you can't question this gentleman, or you don't want to because you are not admitting jurisdiction here. What were you shaking your head about?

Miss Gallagher: It was your remark about tilting with a windmill.

The Court: I thought that was a pretty good remark.

Miss Gallagher: It was a good remark, but I don't think we are tilting with a windmill.

The Court: Whom could you have sold to other than the Army?

Miss Gallagher: Well, he has sold apparently to the Army. I don't know that he has testified as to what he has done with any that might have been rejected.

(Testimony of C. W. Norton.)

The Court: I will ask him. I will save you from having to take any part in this. Have you sold to anybody other than the Army?

A. Any turkeys that are rejected by the Army are subject to resale and we get a permit.

The Court: And you have sold those?

A. We have sold those.

The Court: There is a ceiling price on those?

[149]

A. There is a ceiling price on them, yes.

Mr. Skulason: Q. Some have been rejected?

A. Rejected by the Army. Ordinarily it is on account of sanitation, or something that way. It might be feed, or the head or pinfeathers.

The Court: Is that a big item?

A. No. It might amount to one per cent, possibly two per cent.

The Court: About one per cent of your handling?

A. That is right. Most of these turkeys——

The Court: That comes under the head of *de minimis non curat lex*.

Mr. Skulason: Might I ask him another question about what I stated to your Honor the other day about the responsibility of this client of mine?

The Court: Yes.

Q. What are the assets of your corporation?

A. We are incorporated for \$176,500.00.

Q. What is your corporation worth now?

A. Well, I really don't know what the book

(Testimony of C. W. Norton.)

value is right at the moment because the books were closed a year ago.

Q. Was it that much?

A. Equally that much; maybe more than that, yes, sir.

Q. Any obligations or liabilities?

A. No, sir.

Q. Stock paid up? A. Yes, sir. [150]

The Court: You had better step down, Mr. Norton.

Mr. Skulason: That is all.

(Witness excused.)

The Court: So that leaves what we are dealing with the overpayments to the growers, doesn't it?

Miss Gallagher: No, your Honor. We—wait. Will you say that again, so I will be sure I am not mistaken?

The Court: He has paid the growers, by your example, 1 cent more than he should, because he didn't charge enough for the processing.

Miss Gallagher: That is right. He may have overcharged the Government. He may have overcharged on the civilian sales.

The Court: How could he overcharge the Government? The Government told him what it would pay.

Miss Gallagher: The Government told him what the price is—what their price is.

The Court: Yes.

Miss Gallagher: There are many examples, a

great many examples of overcharges to the Government. Whether he has done it or not I can't tell you, but there are loads of sawdust, loads of gravel, lots and lots of everything sold to the Government at over ceiling prices. Processed foods and a lot of things we know about have been sold to the Government over ceiling prices. There is a ceiling price on stuff he can sell to the civilian trade.

The Court: He says the civilian trade is one to two per cent [151] of his handlings.

Miss Gallagher: It is a small part, no doubt.

The Court: Yes.

Miss Gallagher: It probably is a large proportionate part of the amount of turkeys going to the civilian trade, however, if Mr. Norton handles one-third of the turkeys of the State of Oregon. He is required to keep records of all his sales and all his purchases. I don't know what he is doing about having kept his records, or having kept them properly.

The Court: Well, I have no doubt he has kept records.

Miss Gallagher: I have no doubt.

The Court: Yes.

Miss Gallagher: Probably so, but we would like to look to see and to know that, your Honor. He may have overcharged rates on his export; we don't know; and we would like to know.

The Court: What export?

Miss Gallagher: He remarked that the Government tells him how much he may charge for Army,

how much he may charge for export, for boxing, for strapping.

The Court: Export to whom?

Miss Gallagher: Export by the War Shipping Administration, I imagine. I don't know to whom he sells. I don't know what he exports. I don't know how much he exports. Those are the questions, your Honor, we want to get to.

The Court: What do you export? [152]

Mr. Norton: For instance, today the Army requires all turkeys under 22 pounds be packed in an export box, wire-bound or stapled.

The Court: They go to the Army?

Mr. Norton: They go to the Army. The Army wants to ship them overseas. And those 22 pounds and over, they do not require strapping; they stay for local consumption.

The Court: Do I understand correctly the Army is taking all you are handling, except one to two per cent degrade?

Mr. Norton: They take all, except they tell us what they want to do with them. But the Quartermaster takes them all.

The Court: The Army?

Mr. Norton: That is correct.

The Court: Not the Navy?

Mr. Norton: The Quartermaster buys for the Navy.

The Court: All right; for the armed forces?

Mr. Norton: For the armed forces.

The Court: They are all going to the armed forces?

Mr. Norton: That is correct.

Mr. Cannon: Your Honor, should we be required to go to the Army, the Quartermaster's Corps in Seattle, or whoever may have kept the record of the invoices with Mr. Norton? Probably we should have sent to the Army and examined those records, or examined the records of the Army to find out how much Mr. Norton charged.

The Court: Did the OPA fix the ceiling prices of what the Army and Navy should pay for turkeys? [153]

Mr. Cannon: I don't know on turkeys. They have on other things.

The Court: Do you know, Mr. Norton?

Mr. Norton: Your Honor, the war Food and the OPA together set the price. As an illustration, they set up, they said for the month of July a 2-cent premium; for the month of August a 2-cent premium; for the month of September a 1-cent premium, and October—or for September a 2-cent premium also; then for October it went down to a 1-cent premium in order to get early turkeys. But it is a joint order between the War Food and the OPA. I have the copies of them if your Honor would like to see them.

Mr. Cannon: Your Honor, I might explain that. I think this is generally true. It may not be applicable here, insofar as the Government paying over the ceiling. Very frequently, as Miss Gallagher pointed out, there are situations in which parts of the Government have paid over ceiling prices, but

It was felt perhaps desirable, even though they should be liable for the regular remedies if they paid over the ceiling price, and perhaps sometimes that is why they are not as careful as they might be about the ceiling, because their primary concern is to get the commodity and get it to the place it is needed.

The Court: How about the whiskey the Treasury sold at Los Angeles over ceiling prices at public auction?

Mr. Cannon: I am afraid that is out of my jurisdiction.

The Court: You know about it, don't you?

Mr. Cannon: No, I don't. I am sorry. [154]

The Court: It was felt by the Los Angeles office the Act didn't cover such things. It just didn't cover a sale by one branch of the Government. The Treasury Department confiscated certain liquor in Los Angeles—not an unusual thing—put it up for sale at public auction, as the law requires in certain cases, and more was paid for it than the OPA ceiling price for that kind of liquor at that time; so the question was whether that was an actionable violation of the Price Control Act and the regulations thereunder, and it was felt that it was not, because the Government or an agency thereof was not named as a person under the Act. Now then, take the converse of that, a sale to the Government above the ceiling price, is that a violation? Suppose it is.

Mr. Cannon: Your Honor, excuse me; I hate to engage in discussion about the legal merits of the Los Angeles case. It was my general impression on similar matters we had a specific order which exempted judicial sales.

The Court: This wasn't judicial; a public auction.

Mr. Cannon: It may have exempted that sort of a sale, too. I don't know really about that, but I know certainly in all my contact with the OPA we have proceeded many, many times on overcharges and various—

The Court: The Bankruptcy Court wants to sell its property one of these days soon, I have heard, and I understand it wants to get all the money it can for creditors. Lord knows they need [155] it. The question was whether it is limited to the ceiling price for that particular kind of property. I have heard that discussed. Now here are the armed forces buying all the turkeys from the United States, and they say what they will pay for them. They tell the dealers, as a war measure, that they can't sell them anywhere else; and they haven't sold them anywhere else. Isn't it very likely a violation of the OPA regulations in such a transaction—in such a large and notorious transaction?

Mr. Cannon: I would say no question about that, your Honor, as far as that is concerned, that there is; that it specifically covers that type of sale.

The Court: That hardly was my question. My question was as a practical matter, is it likely that

There has been a violation of the OPA regulations that need seriously to concern you as an enforcement officer?

Mr. Cannon: In my opinion, without limiting myself to this case, I would say yes, your Honor.

I know many, many cases in which there have been overcharges on similar transactions, and not only in regard to turkeys but particularly in regard to other commodities sold to the Government.

The Court: Well, I am talking about turkeys. A turkey is a fairly simple problem compared with cuts of meat. Right early under the OPA Act we had all the packers in here; I think that was one of the first cases we had under the OPA; and the charge was that they were evading the regulations by degrading. And you had an [156] automobile man down here. I don't call any names; I really don't know any to call; but an automobile repair shop, supposed to repair your car for not to exceed so much for this and not to exceed so much for that. Anybody who has had his car repaired knows as a practical matter these ceilings are not effective. You pay about \$100.00 for what used to cost you about \$25.00. So there will be a little of this and a little of that. That is within their power. There are some things you can't regulate, even in war-times or peacetime. But this turkey problem is a rather easy matter. A turkey is a turkey. And the Quartermaster says to Mr. Norton, "I will take twelve million pounds of turkeys from you in 1944": that is one-third of the Oregon production; "and I

will pay you the ceiling price fixed by the OPA and the War Food Administration." I would not think that in a large, notorious transaction like that it would be much of a field for investigation for evasion. I would think you would have to get the Quartermaster in here who was a party to it.

Mr. Cannon: Well, your Honor, my answer to that would simply be, if there is any possibility of it at all, even regardless of whether there are any violation, or likelihood of violations, we have a right to look at the records; and, after all, if everything is all right, what is the objection to letting us see the records? The law certainly requires that they be kept, and also gives the Price Administrator a right to see them and to copy them, and we feel very strongly that we should have a right to see the records [157] which he has.

The Court: Now I will tell you, we have worked around to something where we can really exchange some views to advantage.

There is in the background of all of these regulatory statutes a major question, so far as the courts are concerned, and that is this: Whether the Congress intends to, indeed whether it can, really make a rubber stamp out of the Court and say, "We are creating an administrative agency, and when they come up to you and tell you that John Jones has not done what they have demanded of him or required of him, or requested of him, you must give them an order on John Jones to do that, and if he then does not do it he is subject to a contempt proceeding and you must proceed to try him for that", incidentally

without a jury, perhaps, although that is another question, "and impose punishment on him."

That is a major question, so far as the courts are concerned, that is in the background of all these things. I take it that the United States Supreme Court, perhaps, it seems to me, for the first time in recent years, rather got the feel of itself as, a court in the case that your people pressed on it as to the issuance of injunctions. When your people pressed on them the claim made in that case it never had occurred to them before that even though they are an appellate court, and the highest appellate court, the claim there made tied their hands, too. If every District Court had to, on a showing of violation of the Act, without regard to willfulness, or without any consideration of the [158] circumstances, on request of the OPA had no discretion but to issue an injunction, which was the proposition that was advanced in the Hecht case, I think all at once the United States Supreme Court came alive to the fact that on such a claim they could not undo anything that had been done in a court below; if the lower court had issued an injunction in the Hecht case, which, as I remember, was a department store case in Washington, D. C., where the proprietor was really trying to find out what it was all about and doing the best he could; he had a large number of clerks, green clerks; and I think for the first time it occurred to them that if this construction of the law were yielded in a case that seemed very inequitable to them, when it got up to them on appeal by the citizen they could not do anything about it,

either. It is all right to sit at the top of the heap and say that the fellow down at the bottom should go along and follow the letter of the statute, but all at once the question pops up to the top and a broader realization of the question that is involved in administrative laws of the country presents itself.

Now take the condemnation statute, there is a lot of new ground being broken there. A lot of questions remain to be settled. It is pressed on the District Judge all of the time—the pressure is going off a little now, but there has been an enormous number of condemnation cases—that he is no more than a rubber stamp; that when the Public Lands Division of the Department of Justice comes in and says, “We are making a formal showing [159] of the need of the Government for possession of the property”, that the Court must grant such an order of possession, despite the fact, as in one instance which comes to me—many others could be recalled—that thirty or forty families were about to be put out in the snow down in the little town of Bandon, the place that had burned out not a great while before and not much housing had been restored. In the middle of the winter thirty or forty families were to be put out without notice—the aged, women and children, some of them sick. No inquiry could be made into the circumstances; “No, you must sign the order”, regardless.

Now here we are in the enforcement of the Price Control Act, and I am glad to be able to recall the sentence of Justice Douglas in the Hecht case, that

not just the OPA agency is charged with the highly important duty of attacking the evil of inflation—that the courts themselves may be trusted to be equally alert to the needs of the time and the urgencies of the situation; which means no more than this, when you boil it down: You, as administrators, exercise your discretion every day as to whom you will proceed against and whom you don't. You could not do any other way. The statute does not say that you must in every case bring a criminal proceeding against every violator. That would not do. That would be “gestapo” such as the world has never seen or heard of. So just because you very energetic people find a case that you think calls for an investigation or a certain action, when you come in to me and you ask me to do something about it, I claim, [160] and always shall claim until somebody bumps my head about it, that I have the same right to look at the facts and exercise my judgment, even to the extent of disagreeing with you as you exercised your judgment and discretion in the first instance.

That is the great thing about the criminal side of it. There is no way in the world to take away, fortunately, from the citizen the Anglo-Saxon heritage that in the long run twelve men and women are going to decide the whole thing in the criminal prosecution. I could sit here until I was black in the face and tell them what their duty was about finding somebody guilty, and I have been expecting any one of these days in the draft cases where no

defense is even made, the man simply comes in and demands his trial, dozens and hundreds—I have been expecting the jury a good many times to go right upstairs and come back and hand me a verdict of “Not Guilty,” where I just got through telling them they must find that man guilty.

So there are these cushions in our judicial system, and they have deep roots. They go back to antiquity. And so the party that invokes the aid of a court, whether it be the Government, which happens to be the party in the major number of cases, and has been for many years in the federal courts, and will be increasingly so, when he invokes the aid of the Court he invokes “judicial action,” and implicit in those words “judicial action” the Court is doing what? Exercising legal discretion, which in the long run means doing what the Court thinks is right and just [161] and necessary under all the circumstances.

So I say that I think I am just performing my simple duty in finding out what this or any other case is about, reducing it to fundamentals; and I am not impressed that, the turkey business having been taken over, so far as the purchasing end of the finished product is concerned, by the armed services, there is any practical field for inquiry there as to possible evasion of the Act. If there were we would have the anomaly—well, I will just leave it there. We would have a very unusual situation. So this matter here reduces itself, as far as I am concerned, to whether or not this com-

pany, by declining to observe the order about processing, has paid to growers more than it should.

Now we have heard this afternoon that a device is going to be set up whereby a rebate can be made to the grower so as to put this plaintiff on the same basis as the cooperatives are. I suppose that information is new to you, is it?

Mr. Cannon: Yes, your Honor. If I may interrupt—excuse me.

The Court: Yes.

Mr. Cannon: Perhaps I didn't make this clear. It is not our position that your Honor has no discretion in regard to the issuance of the order to show cause to inspect the records. It is our position that the defendants have shown no facts at all from which your Honor could exercise discretion to refuse it. In other words, if the Price Administrator had gone out there and said, "Let us through all certain accounts and records which the Act does [162] not provide to be kept," of course the District Court would have discretion to say to the Price Administrator, "You can't go out there and serve a requirement for the production of certain records which the Price Control Act does not require him to keep," and if there was any other evidence to show the Price Administrator had not acted properly in pursuance of the Act I certainly believe, and say without hesitation, your Honor would have discretion. It is just the type of case which Congress had in mind, in which your Honor should and would invoke discretion. Our position is it is clear. It is not denied the inspection requirement was in

accordance with the section of the regulation and defendant refused to permit examination of the records, and on that it is our position there are no facts which would justify your Honor in refusing to grant the order.

The Court: You have pretty full information now, given here this afternoon, as to what this company has done. It has done all of its business over whatever period you are interested in, in disregard of G-93, and it has continued to pay these prices per head the same as it did in the past, and it tells you how much business per year it does in turkeys, both in dollars and percentage of birds, and if you think that calls for either an injunction proceeding or a penalty case, you have ample material, it seems to me, to file a complaint, and and when you file a complaint in this Court you have all of the rights of discovery that our rules of procedure give all litigants, which has been found very [163] ample; so why don't you sue him if you believe he is a violator? He has invited you to sue him because he is responsible.

Mr. Cannon: You want me to answer that, your Honor?

The Court: If you want to. You don't have to.

Mr. Cannon: Well, the only thing is, I am in a little bad position to answer that, why we don't sue a man on the basis of what is in our information, from very incomplete information as to how he has been conducting his business. Certainly I think your Honor would agree perhaps on our part it would be a little bit premature to jump into a suit,

particularly of a criminal nature, especially where we are not absolutely sure of what the man has been doing, and it certainly seems to me it would be only fair we should have a right to see his records first to see what, if anything, he has done.

The Court: I wonder if you have a right to go into a man's records if he protests, primarily to criminal prosecution.

Mr. Cannon: Well, of course it is our position we do, your Honor.

Miss Gallagher: The Price Control Act grants immunity.

The Court: How about the Constitutional guaranty against self-incrimination?

Mr. Cannon: Well, your Honor, specifically this would lead us into a rather long discussion. There are certain provisions in the Price Control Act which relate to that, as to the fact that the claim of self-incrimination shall not be valid, but, nevertheless, [164] certain immunities from the Compulsory Testimony Act of such and such a year should be applicable.

The Court: I am talking about Constitutional guaranties against self-incrimination.

Mr. Cannon: Yes, sir. That is the section of the Act that is put in to protect these Constitutional guaranties.

The Court: You can bring a proceeding before a grand jury—I am not an expert in criminal law. All my colleagues are. I am getting on bad ground. I will just state what I understand to be fundamentally true. You can bring anti-trust proceed-

ings before a grand jury and you can issue a subpoena to a man to come in and bring his books and records, but you can't do it as a basis for getting information for prosecuting him.

Mr. Cannon: Your Honor, in that connection, probably our discussion——

The Court: Lots of times he comes in and coughs up before he gets counsel, or in the hope he will get immunity and somebody else will be indicted, but you can't move directly against a man, if I understand the Constitution correctly, to make him convict himself.

Mr. Cannon: The applicable section, your Honor, is section 202 (g) of the Price Control Act, which provides: "No person shall be excused from complying with any requirements under this section"—that is about testifying or giving us certain records—"because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893, [165] shall apply with respect to any individual who specifically claims such privilege."

The Supreme Court has specifically held, time after time, that is sufficient protection under the Constitution.

The Court: Go on and be a little plainer. You can't prosecute him on information he has given?

Mr. Cannon: The law is equally open to defendant's interpretation, by defendant's counsel, as by me. That is what it says.

The Court: Well, isn't that what that says?

Mr. Cannon: That is right.

The Court: That he gets immunity if he claims his Constitutional guaranty against self-incrimination.

Mr. Cannon: "but the immunity provisions of the Compulsory Testimony Act of February 11, 1893, shall apply with respect to any individual who specifically claims such privilege."

The Court: In other words, you can't prosecute him if he claims privilege. We understand each other. So where does that bring us? We have had here this afternoon admission by the man in the courtroom he does all of his business in disregard of G-93. You say you want more than that?

Mr. Cannon: Yes, your Honor.

The Court: And you said a minute ago you wanted more of it perhaps as a basis for criminal prosecution. That is what provoked this discussion.

Mr. Cannon: To be clear on that, I am not to be taken as [166] threatening any sort of prosecution at all.

The Court: I know.

Mr. Cannon: I mean, I am wanting the records to find out the facts, and unless we know the facts we have to determine the best we can as to what should be done.

The Court: The difference between you and me is, I haven't developed any information this afternoon that is satisfactory to you ladies and gentlemen; that is, sufficiently satisfactory. To me, if I were where you are I would go down and draw up a complaint tomorrow. I would not think I could get any more by looking at the man's books. I

would say, "The defendant, between certain periods, has been disregarding G-93 and has sold approximately so many hundred thousands of turkeys to the Quartermaster, and for approximately a certain amount."

Mr. Cannon: In view of that, if your Honor feels that we haven't shown what we should show, then I do submit your Honor should have refused our motion that we have made in the case, and in regard to the production of records.

The Court: You feel what?

Mr. Cannon: In other words, I feel if we have not made out our case, of course that your Honor should not issue the order.

The Court: That wasn't what I stated, Mr. Cannon. What I said was, what it comes down to is, there has not been developed here information that seems sufficient and satisfactory to you and Mr. Wagner and Miss Gallagher. [167]

Mr. Cannon: Yes, sir.

The Court: Put on your other testimony, Mr. Skulason.

Mr. Skulason: Mrs. Spath.

MRS. LEONARD SPATH

was thereupon produced as a witness in behalf of Respondents in Civil No. 2565 and the Plaintiff in Civil No. 2575 and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Skulason:

Q. You have the name of the witness?

A. Mrs. Leonard Spath.

Q. Martha Spath? A. Yes.

Q. Where do you live?

A. We live at 11382 Southwest Capitol Highway.

Q. That is near Portland here, is it?

A. Yes.

Q. Are you married? A. Yes.

Q. What is the name of your husband?

A. Leonard.

Q. What business are you and he in?

A. Turkey business.

Q. Have you been in that for some time?

A. Ten years. [168]

Q. And to what extent, generally speaking?

What volume? A. About three thousand.

Q. On the 24th of last month did anyone call on you purporting to come from the OPA?

A. Yes.

Mr. Cannon: I object to that—excuse me, your Honor—on the ground it is incompetent, irrelevant and immaterial. And likewise, if counsel will agree, I will object to all other testimony by this witness on the same line.

(Testimony of Mrs. Leonard Spath.)

The Court: Admitted subject to the objection.

Mr. Skulason: Q. Did you learn the person's name?

A. Yes. Mr. Rodeback.

Mr. Skulason: Mr. Rodeback. Your Honor will remember he testified here in this case.

Q. Did he say anything to you about selling turkeys to Mr. Norton's company? A. Yes.

Mr. Cannon: I object to that, your Honor, on the ground it is incompetent, irrelevant and immaterial. Even assuming that your Honor has jurisdiction to pass upon the validity of the regulation, that could conceivably have no bearing on the validity of the regulation, as to what Mr. Rodeback told her, plus the fact it is also hearsay.

The Court: Do you know what he told her?

Mr. Cannon: I say it has no materiality whatsoever. [169]

The Court: I want to know, do you know what he told her?

Mr. Cannon: Why, I certainly have no idea.

The Court: I have heard what he told her. I think you will be interested in it. Go on and tell. Objection overruled. You can't tell what the answer is going to be. I think you will be a little surprised.

Mr. Skulason: Q. You say he did talk to you about selling turkeys to Mr. Norton?

A. Yes. He told us we should not sell Mr. Norton any more turkeys, because if we did the OPA would come back on us and we would have to pay that difference in price.

(Testimony of Mrs. Leonard Spath.)

Mr. Cannon: I object to that and move to strike it out.

The Court: The motion is denied. I don't want any cumulative testimony. Just put on one witness.

Mr. Skulason: Yes.

Q. Did he say anything about Mr. Norton and his business practices?

A. Yes. He said he was a rebel, and he was a cheat, and he undergraded.

Mr. Cannon: I make a motion that that be stricken out as hearsay; also incompetent, irrelevant and immaterial.

The Court: The motion is denied.

Mr. Skulason: Q. Did he use any other expressions about him?

A. Yes. He called him a renegade.

Mr. Cannon: The same objection.

The Court: The same ruling. [170]

Mr. Skulason: Q. Anything else?

A. I can't—(witness pauses).

Q. Did you write, you and your husband reduce to writing what you are now telling us about?

A. Yes. Mr. Spath wrote down the things that he told him.

Q. And did you and he sign that? A. Yes.

Q. And was that statement true?

A. Yes, that is.

Mr. Skulason: We ask that the witness be allowed to see this letter to refresh her memory.

(Paper passed to the witness.)

(Testimony of Mrs. Leonard Spath.)

Q. What is this that you are shown now?

A. This is the letter that my husband wrote.

Q. When?

A. On the 24th of September.

Q. Is that the date Rodeback was there?

A. Yes.

Q. And will you look at that, please, and state whether or not that is true, what is in there.

A. Yes, that is true.

Q. Is that your signature to it? A. Yes.

Q. And your husband's? A. Yes. [171]

Q. And who wrote it, first?

A. Mr. Spath did.

Q. In longhand? A. Yes.

Q. Or on the typewriter?

A. In longhand.

Q. Then how was it reduced to typewritten form?

A. He took the longhand up to Mr. Norton's office and his secretary did it.

Q. Have you the——

A. The original? Yes.

Q. Have you the original writing?

A. Yes. Uh huh.

Q. With you? A. Yes.

Q. Will you produce it?

A. He just wrote it just on a piece of paper.

Q. That is what you have now, is it?

A. Yes. Uh huh. It is the same thing.

Mr. Skulason: The same thing. I offer these two documents in evidence, your Honor.

(Testimony of Mrs. Leonard Spath.)

Mr. Cannon: Well, just a minute.

The Court: I don't want them in the record. They are rejected.

Mr. Skulason: All right.

Q. Now having read the two letters you have there and refreshed [172] your memory, will you state whether or not Mr. Rodeback used any other expressions about Mr. Norton and his business than those you have told us about.

A. He called him a rebel, a cheat, and called him very dishonest, and also he called him a renegade.

Q. And what about weights and underweights?

A. Yes. He said he gave us also underweights, and also undergrads.

Q. What about his honesty?

A. Well, that he wasn't an honest man.

Q. And about selling turkeys to him, did he say anything further than what you have said?

A. Well, he said that we should not sell to Norton but to sell to Columbia Produce, that we would get an honest grade and an honest weight.

Mr. Skulason: You may cross examine.

Mr. Cannon: No cross examination.

Mr. Skulason: That is all, Mrs. Spath.

(Witness excused.)

Mr. Skulason: Just one brief witness, if your Honor please.

THAD R. PERRY

was thereupon produced as a witness in behalf of Respondents in Civil No. 2565 and the Plaintiff in Civil No. 2575 and, having been first duly sworn, testified as follows: [173]

Direct Examination

By Mr. Skulason:

Q. Your name, please?

A. Thad R. Perry.

Q. Where do you live? A. Seattle.

Q. What is your business?

A. Wholesale produce.

Q. Do you handle turkeys? A. Yes, sir.

Q. How long have you lived in Seattle?

A. Since July 6th, 1902.

Q. How long have you been in that business?

A. Thirty-eight years.

Q. In handling turkeys and other poultry?

A. Yes, sir.

Q. And what are you, an independent dealer or a member of a cooperative? A. Independent.

Q. Are you engaged in the same line of business as Mr. Norton's company? A. I am.

Q. And have you been notified under that order G-93?

A. Everybody in business is amenable to it that is supposed to be.

Q. Everybody in Washington? [174]

A. Yes.

Q. And have you been complying with it?

A. Not one hundred per cent, no.

(Testimony of Thad R. Perry.)

Q. What can you tell us as to what the business practice has been in the State of Washington in recent years in regard to the processing of turkeys and selling them?

Mr. Cannon: I object to that as incompetent, irrelevant and immaterial.

The Court: Admitted subject to the objection.

Mr. Skulason: You may answer.

A. The turkeys have been dressed up till a few years ago, primarily by the rancher on the farm. The last few years, why, a few independents and cooperatives both have established turkey dressing stations in the country to give this service.

Q. And before this order came out on what basis, per head or pound basis, did you handle the turkeys?

Mr. Cannon: I object to that, your Honor. May we have the same stipulation here, that all other questions will be objected to on the same grounds?

Mr. Skulason: It may be stipulated.

The Court: The same ruling. Admitted subject to the objection.

Mr. Cannon: I am trying to save time, to have it agreed we will make the same objection.

Mr. Skulason: If we have anything to say about it, your Honor, we agree to that. [175]

Mr. Cannon: Well——

Mr. Skulason: Q. Now then, the question was, on what basis, per head or per pound basis, the custom has been handling turkeys in the State of Washington?

(Testimony of Thad R. Perry.)

A. Well, that has varied over a period of time. Last year we charged 30 cents straight across for hens and toms, and this spring we charged 30 and 35, according to this directive when it came out about the 2nd or 4th of May.

Q. Previous to that what did you charge?

A. 30.

Q. And always on the per head basis?

A. Always per head; never any other way.

Q. Now will you tell us what difference it makes to the trade, if any, to put the loose and boxed turkeys on a per pound basis?

A. All right. You take a 14-pound hen turkey and the charge for that, if we charged 30 cents for the dressing of that bird that is very easily computed. If we took that 14-pound hen turkey and changed it over to the $3\frac{1}{2}$ cent charge, which was required in G-93, 3 times 14 is 42 and 7 is 49 cents. That would be 19 cents more than what we were charging before.

Now you take it in the month of May when breeder turkeys were offered, we received this directive on the 10th day of May, May 9th, and on the 11th day of May we filed a protest regarding this and in the letter we stated that we had the day before, the 2nd, on the day before, dressed tom turkeys that averaged 35 pounds [176] apiece. Those turkeys, if we had charged 35 cents for them that is easily computed, but if we had to switch over to the pound basis and had charged $3\frac{1}{2}$ cents a pound, or 3 cents a pound, that would be \$1.05. Now there

(Testimony of Thad R. Perry.)

we would raise our charge, we would have to raise our charge to the shipper from 35 cents to \$1.05, which we rebelled. We said that we did not wish to be a party to a confiscation of a farmer's property.

Q. What effect would it have upon your business in obtaining turkeys if you had to make that charge?

A. Well, there has never been a directive, national or regional, that has ever been issued in the Northwest pertaining to any agricultural product that we know of that has created the furors that this has.

Q. Who would be the loser under this order?

A. It is a Ripley's Believe It or Not. I never heard of a case where the business fraternity or the business houses have gone into Court kicking because the Government, the OPA or any other department of the Government, had awarded them too much profit. That is exactly the position of the businessmen today in this field. We don't care to be a party to robbing the farmer. If we follow this directive, why, the farmer would be the loser, of course.

Q. Yes. This does not apply to cooperatives, however?

A. Cooperatives? No. Monday morning, the morning that I got this directive, I called up a sales agent for a cooperative in our district and I says, "Have you heard about this new directive, [177] G-93?" And he says, "No. What is it?" I read

(Testimony of Thad R. Perry.)

it to him. It was short. I said, "What is your disposition about that? Do you think that is fair, or do you feel like offering a remonstrance?" He says, "Why in hell should we offer any objection to it? If it is too much we refund it to the producer in the form of dividends, so he isn't out anything at all, through our membership." And so they haven't.

Q. Can you tell us how many pounds of turkeys are processed in the State of Washington per year?

A. No, I am not certain. There isn't as many as Oregon, but one-third of the turkeys raised in the whole United States I understand are raised in the three states of California, Oregon and Washington, and it is a very large number.

Q. Yes. And what proportion of the turkeys can you tell us in round numbers is being handled by cooperatives in Washington?

The Court: Are you going to miss your train?

Mr. Cannon: Your Honor, I hate to do this. I have to catch a plane at 4:25. I don't want to miss it but I want to be here at the end. I don't know how much longer it will be.

The Court: Wind this up.

Mr. Cannon: I will stipulate he will testify the same as the other fellow.

Mr. Skulason: I will certainly accommodate counsel, if I can. Will you read the last question.

The Court: He has to catch an automobile to go to the airfield. [178]

(Testimony of Thad R. Perry.)

The Witness: On that question about that relative amount the co-ops handle?

Mr. Skulason: Yes.

A. Well, I would say something like probably two-thirds.

Q. Mr. Perry, you have had long years of experience in this line. Are you an officer of some corporation handling turkeys?

A. My own firm, my own business, Perry Brothers. My own name is the head of it. I am an officer and it is a family affair.

Q. Well, could you carry on your business if this order were enforced and you were compelled to obey it?

A. I would not have very much turkey business very long. The producers would—in fact, one or two of them we know of now are putting in their own dressing plants. They are going to try it out.

Mr. Skulason: You may cross examine.

Cross Examination

By Mr. Cannon:

Q. One question. You said that you had not complied with the regional order G-93; is that correct?

A. In the 30 and 35 cents, the charge for the kill and haul, we did comply with that, but that only applies up to the point that a turkey goes into the cooler. Just as soon as you stick it in a cooler box the directive says you can't charge that any more; you have got to switch over to a pound basis, and we haven't complied with that. [179]

(Testimony of Thad R. Perry.)

Q. You haven't, although you knew that the order required that?

A. We knew that the order required that. That is right.

Mr. Cannon: That is all.

Mr. Skulason: That is all.

(Witness excused.)

Mr. Skulason: That is all of our case.

The Court: Nothing more on the other side?

Mr. Cannon: That is all.

The Court: Now on your injunction proceeding, Mr. Skulason——

Mr. Skulason: We are here on both cases together, I understand.

The Court: I know, but I am talking now solely about your injunction proceeding.

Mr. Skulason: Yes, your Honor.

The Court: The case you brought as plaintiff.

Mr. Skulason: I understand.

The Court: Your motion for a temporary restraining order is denied. I reserve ruling on the defendant's motion to dismiss. I am not persuaded that jurisdiction was restored by the amendment, 2 (m). Is that what you call it, 2 (m)?

Mr. Skulason: Yes.

The Court: The case will ride on the calendar and any further light that is available by either party will be welcomed by me. As to the Government's, or, rather, the OPA's proceeding for the order directed to Northwest Poultry and Dairy Products Company, [180] I reserve decision on that.

We will adjourn until ten o'clock tomorrow morning.

(Thereupon, at 4:05 o'clock P.M., court was adjourned.) [181]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, hereby certify that on Friday, October 6, 1944, I reported in shorthand the oral proceedings had and the evidence given in the above entitled matters before the Honorable Claude McCulloch, Judge, and that I subsequently caused my shorthand notes to be reduced to typewriting, and the foregoing and hereto attached transcript, pages numbered 54 to 181, both inclusive, constitutes a full, true and accurate record of all of [182] said oral proceedings had and evidence given upon said hearing on October 6, 1944, in said matters.

Dated at Portland, Oregon, this 20th day of October, A. D. 1944.

ALVA W. PERSON

Court Reporter.

[Endorsed]: Filed Nov. 10, 1944. [183]

[Title of District Court and Cause.]

Portland, Oregon, Thursday, November 9, 1944
10:05 o'clock A. M.

Before: Honorable Claude McColloch, Judge. [184]

PROCEEDINGS

The Court: Mr. Wagner.

Mr. Wagner: If your Honor please, we have pending, as I understand it, from your Honor, last Monday, the two cases, Northwest Poultry and Dairy Products Company v. Bowles, and also the Administrator's case, Bowles v. Northwest Poultry and Dairy Products Company, the latter of which is asking for an order requiring the production of documents. I don't know which order the Court wants to take those up in. I would like at this time, however, to introduce to the Court Mr. William B. Wetherall, from the San Francisco office, who is in Mr. Cannon's office, and we would like permission of the Court to have Mr. Wetherall appear of record, and a motion for his admission to the Court has already been filed.

The Court: Yes. We will try the case in which Mr. Skulason appears for the plaintiff. That is the case we will try this [185] morning.

Mr. Skulason: Yes. That is referring to those two cases?

The Court: Yes.

Mr. Skulason: The show cause matter comes first, I believe?

The Court: Why?

Mr. Skulason: The application to show cause I think comes first.

The Court: Give me the file. That was filed first and we haven't been discussing it. What do you mean, the application for production of documents?

Mr. Skulason: No. For permission to examine our records and books.

The Court: Well, just lay that aside and we will try the case in which you appear as plaintiff now.

Mr. Skulason: Very well, your Honor. The Court then is taking jurisdiction in that case, of course?

The Court: Will you say that again?

Mr. Skulason: We are prepared to go ahead with that case.

The Court: Yes.

Mr. Skulason: Now may I say this, reminding your Honor that we had a hearing here and called several witnesses and their testimony has been transcribed.

The Court: Yes.

Mr. Skulason: And I don't wish to go over that ground again.

The Court: No. That is part of the case. [186]

Mr. Skulason: That is part of the case?

The Court: Yes.

Mr. Skulason: Well then, we are ready to go ahead.

Mr. Wetherall: If your Honor please, if I might interrupt a moment here, in regard to the so-called 2 (m) case, which I understand——

The Court: What 2 (m)? I don't know what that means.

Mr. Wetherall: In other words, a declaratory judgment case.

The Court: That is the one you are bringing?

Mr. Skulason: Yes, your Honor.

Mr. Wetherall: I think we should call your Honor's attention at the outset here to a recent opinion of Judge La Buy, of the Northern District of Illinois, which holds that the exclusive jurisdiction provision in Section 204 (d) of the Emergency Price Control Act is not effective, affected by Section 2 (m) of the Act, which is of course relied upon by the plaintiff in the case which is now coming up for consideration. We have handed a copy of the Court's opinion in that case to counsel for the plaintiff and we should like to pass a copy up to your Honor at this time. This action is fairly in point and, so far as it affects the present case, constitutes a clear and direct authority for the proposition that this Court has no jurisdiction to entertain any question regarding the validity of any price regulation or order in a matter of this kind.

Now I should like to enter into a more detailed discussion of the opinion here.

The Court: What is the status of the pleadings? I have the wrong case here, the wrong file. What is the status of the pleadings in this case?

Mr. Wetherall: In this matter we have presented, your Honor, a motion to dismiss the complaint.

The Court: I reserved ruling on that, didn't I?

Mr. Wetherall: Yes. I believe you took that matter under submission.

The Court: If you have never answered right that is your own fault.

Mr. Wetherall: That is correct.

The Court: Mr. Wagner told me informally the other day, or you said in court here the other day, that that is the only pleading you expected to put in?

Mr. Wagner: That is right, your Honor.

The Court: Yes. So that should I—all right. Now you want to be heard further as to the jurisdiction point?

Mr. Wetherall: I would appreciate it, yes, sir.

The Court: Go ahead.

Mr. Wetherall: In this connection, Illinois Packing Company v. Defense Supplies Corporation, the plaintiff set a declaratory judgment under Section 2 (m), which is the very provision relied upon by the plaintiff in this case, declaring invalid a certain provision contained in the regulations promulgated by the [188] Defense Supplies Corporation governing the payment of subsidies to meat slaughterers.

The regulation involved was Regulation No. 3 of the Defense Supplies Corporation, and Amendment 2 of that regulation provided for the payment of extra compensation in addition to what is commonly referred to as base compensation in the form of subsidy to slaughterers of meat, and this extra compensation was allowed for non-processing, or

to, rather, non-processing slaughterers, and the rate there was 80 cents per hundredweight in addition to the regular compensation.

Now the amendment to the D.S.C. Regulation contained certain definitions of non-processing slaughterer, who, if the definitions were complied with, would be entitled to the extra subsidy.

The term non-processing slaughterer was given a certain definition, which I think we need not go into here in any detail, but the non-processing slaughterer had to be under these definitions an unaffiliated slaughterer and an unaffiliated slaughterer was defined in the regulation as follows:

“Unaffiliated slaughterer means”—and I am reading, your Honor, from page 2 of the Court’s opinion in the Illinois Packing Company case—“Unaffiliated slaughterer,” line 5, “means a slaughterer who does not own or control a processor or purveyor of meat and who is not owned or controlled by a processor or purveyor of meat. Unaffiliated slaughterer shall not include [189] any institution, representative or agency of Federal, state, or local governments.”

Then in subparagraph 4 of line 11 of the opinion, it reads:

“Own or control means to own or control, directly or indirectly, a partnership, equity, or in excess of 10 per cent of any class of outstanding stock, or to have made loans or advances in excess of 5 per cent of the other persons monthly sales.”

Now it was this latter paragraph No. 4 which was called into question in this proceeding. The Defense

Supplies Corporation had paid out subsidies in the amount of more than \$300,000 to the Illinois Packing Company and then when it appeared that the Illinois Packing Company had not qualified as a non-processing slaughtering, within the meaning of the D.S.C. Regulations, the Defense Supplies Corporation commenced to withhold subsidy payments and to compel them, as an offset against the payments which had already been paid out.

Now it so happens, as appears from the opinion, that the packing company finally disposed of more than 10—rather, that the ownership of more than 10 per cent of the stock which had been held by a processor or purveyor of meats, so as thus to disqualify the company from claiming extra subsidy, was finally disposed of in May of 1944, so that thereafter D.S.C. admitted that the company was entitled to the extra subsidy [190] but it withheld its subsidy—as I say, applied it as an offset against subsidy payments which had already been made.

This suit, then, which was brought under Section 2 (m) of the Emergency Price Control Act, sought to have the Court declare invalid this particular definition which I have just referred to upon various grounds.

The Court has found that the subsidy payment was made pursuant to Section 2 (e) of the Emergency Price Control Act, which does relate to subsidies. It then found—I neglected to state that defendant had filed a motion to strike the complaint based on the jurisdictional ground, and the Court in granting that motion and holding that it had no jurisdiction to hear the matter, found, as I have in-

dicated, that the subsidy had been paid pursuant to Section 2 of the Emergency Price Control Act. It then found that Section 204 (d) of the Act, which we commonly refer to as the exclusive jurisdiction provision, applied to this case, and then the Court proceeds to point out that unless jurisdiction is offset by Section 2 (m) the Court, under Section 204 (d), does not have jurisdiction to entertain the matter.

If your Honor will turn to page 6 of the opinion, line 3, the opinion reads: "Under the plain language of Section 204 (d) this Court has no jurisdiction to pass upon the validity of such regulation unless that power is conferred upon the Court by Subsection (m) of the amendment of Section 2 of the Emergency [191] Price Control Act of 1942, which provides as follows."

Then the Court concludes, dropping down to line 19:

"The Court has considered the language of this sub-paragraph and is of the opinion that it does not confer jurisdiction upon this Court to pass upon the validity of the regulation in question. The Court is impelled to the above conclusion for the following reasons."

Now the Court thereafter sets forth, I believe, six reasons in support of its conclusion of law, and of course finally declines to entertain jurisdiction.

Now so far as the Court's reasoning is concerned, I don't know that it is necessary at this time to go into that at any detail. As a matter of fact, we could enlarge upon the reasoning contained in the

opinion, as has been done already, I believe, in previous hearings in this matter. The Court does point out—I think this is the section—that under Section 2 (m) the Court has jurisdiction to consider only whether particular acts, or failure to act, on the part of the Government officers or agencies, are unauthorized under the pertinent regulations.

The Court specifically points out that it has no jurisdiction to consider the question of validity of the regulations themselves, and in that connection makes this important observation. The Court points out that the basic and underlying purpose of Section 204 (d) is to preserve uniformity in any [192] interpretation of the important provisions of the Emergency Price Control Act; rather, I should say, the regulations pursuant to the Emergency Price Control Act, in order that we wouldn't have a multiplicity of varying interpretations of our regulations, depending perhaps upon a number of courts which might entertain questions of validity.

Judge La Buy, in this case, points out that in vesting District Courts with the declaratory judgment jurisdiction under Section 2 (m) to consider whether Government officers are imposing unlawful conditions or penalties Congress was aware of the basic purpose of 204 (d) and that Section 2 (m) does not destroy that purpose but rather limits the Court to a consideration, whether under the facts in the particular case numbered under 2 (m) a Government officer or agency has in fact exceeded its authority under its applicable regulation, or whether it has attached some unlawful condition or penalty

to the payment of a subsidy, and that sort of thing, and that to permit the courts to decide questions of that kind in no way affects the fundamental purpose of Section 204 (d) to preserve uniformity in regard to questions of validity. I think that is an important consideration.

Now we have already indicated to the Court our position in regard to Section 2 (m). I might summarize that briefly.

In the first place, you will note that Section 2 (m), which incidentally is quoted in the opinion in this Illinois [193] Packing Company case, for your Honor's convenience at page 6 of the opinion. The section applies, in the first place, only to three limited classes of cases, or types of cases; one, cases where payments are to be made by some Government agency. Now that specifically refers to a subsidy matter. Two, cases involving contracts for the purchase of commodities by the Government; and, three, cases involving allocation of materials or facilities for fixing of equities.

Now it is to be noted that none of those three classes of cases involves the prices which may be charged for commodities.

The section, then, at the outset, does not pertain to price regulations. And, further, as I have indicated, and as is pointed out by the Court in the Illinois Packing Company case, the jurisdiction of the Court is further limited to a consideration, not of the validity of any regulation involving these three classes of cases which I have indicated, but to consideration whether any Government officer or

agency has, in applying those regulations, imposed some condition or penalty which is not authorized by the applicable regulation. Now that, I submit, falls far short of vesting the Court with authority to consider the validity of the regulation itself.

I believe at the previous hearing an example was given as to how Section 2 (m) might apply. I think this case which we have just cited and discussed gives us a still further example, and I might say a living example of how Section 2 (m) [194] is to apply, and the Court in pointing out the difference between a question involving the validity of a regulation and a question as to whether a particular officer exceeds his authority in applying the regulation, the Court in pointing out that distinction says this:

If, in the case here brought by the Illinois Packing Company, the plaintiff had merely contested the fact whether 10 per cent or more of its stock was owned by a processor or purveyor of meats, that would have presented a factual question of purely local significance, which the Court would have had the jurisdiction to pass upon. In other words, the Court could have decided the fact whether the Defense Supplies Corporation's agent had exceeded its authority under the Defense Supplies regulation in holding that this particular applicant was not qualified under the regulations for the subsidy, inasmuch as more than 10 per cent or more of its stock was owned by a processor or purveyor of meats.

Now that would have been a factual question, of purely local significance, which the Court could

have decided, but in this case the plaintiff went further than that and questioned the validity of the definition itself—the definition in the Defense Supplies Corporation's regulation, which defined what was meant by an unaffiliated non-processing slaughterer, and which of course defined what was meant by the words "own" or "control," as used in the regulation. [195]

I think we might submit even a further example. The Defense Supplies Corporation Regulation No. 3, which governs livestock slaughter payments, contains a provision in Section 10, I believe, to the effect that where the Price Administrator finds that an applicant, a slaughterer, applying for a subsidy, has been in local violation of price regulations or ration orders, the Defense Supplies Corporation has authority to withhold the applicant's subsidy payments. Now since that provision for withholding, which we might say in effect provides a cross-sanction of, shall we say, a penalty and not to indicate that withholding is a penalty—let us just assume that it is a penalty; it provides a penalty under the subsidy provisions of the Defense Supplies Corporation for a violation, not of the subsidy provisions themselves but of a price regulation or rationing.

Now the regulation itself provides, under Defense Supplies Corporation, that an agent of the Defense Supplies Corporation has authority to withhold subsidy payments where the Price Administrator finds that there has been a willful price or rationing violation. Now in that situation our

position is, and has always been, that a D. S. C. agent has authority to withhold the slaughterer's subsidy where there has been a finding by the Price Administrator of a willful violation.

Now assuming that the slaughterer files a case for declaratory judgment under 2 (m), in a situation of that kind [196] our position would simply be that the conduct of the D. S. C. Agent in withholding the subsidy under those circumstances was clearly within the authority given him by the regulation, duly enacted by Defense Supplies Corporation, and, therefore, the Court, under Section 2 (m), would be bound to find that it had no jurisdiction to question the validity of such a provision.

On the other hand, if the plaintiff in such an action were to take the position that the D. S. C. Agent had, for some reason not indicated by the Defense Supplies Corporation, withheld the subsidy, then the Court would have jurisdiction to pass upon that matter. To take perhaps a silly example, if the D. S. C. should withhold the subsidy, simply because the slaughterer didn't part his hair on the right side, or something of that sort, then clearly that is a matter which the Court has jurisdiction to pass upon under Section 2 (m). So it appears to us, then, that this case is clear authority for the proposition that the Court has no jurisdiction to consider the question of the validity of the regional orders which are contested in this case, and that, therefore, our motion to dismiss the complaint should be granted.

The Court: Do you care to argue that point further?

Mr. Skulason: Mr. Henderson wanted to.

Mr. Henderson: If the Court please, we wish to be of whatever help to the Court we can in this matter. If the Court still has an open mind on it, or needs to hear something [197] further, we will be glad to address ourselves to this question. If there is anything that has been suggested by this opinion from the District Court in Illinois that needs to be met, we will be glad to do that. We don't consider that any opinion by any Court is any stronger than the reason and the logic that is supposed to give it effect. If there is any reason and logic in this connection that appeals to your Honor as being persuasive on this question, then of course you should follow it. If it is not just the same as any other District Court you should disregard it; or, as far as that is concerned, any other court.

If the Court is not willing to cite reasons supporting its conclusions that are persuasive, no other court should follow it. To merely say, "we hold this" or "we hold that", means nothing. This is entirely a question of statutory construction. This judge pays no attention to any rule of statutory construction that I know of—just arbitrarily says this. I thought at the last hearing in this we pointed out to your Honor the most persuasive rule of statutory construction that there is, insofar as this Act is concerned, when we went through this Act and showed you in other respects when Congress was addressing themselves to a particular

subject relating to that particular subsection Congress there said "This subsection".

Now in this Act, or in this part, the language is very comprehensive. "If any order, or any person".

To illustrate what I said before,—I dislike to go over [198] what I have already addressed to the Court, to bring it up, to remind the Court. Now take, for instance, in the amendment, Section 2 here on the second page; it says, "he may, without regard to the foregoing provisions of this subsection", do certain things.

"any regulation or order under this section shall be".

"pursuant to the provisions of this subsection".

"nothing in this subsection shall be construed to modify", and so on.

Coming on down, "no power conferred by this section shall be construed to authorize any action contrary to the provisions and purposes of Section 3", referring definitely to what they are referring to.

"this subsection shall", so and so.

"no regulation, order or price schedule issued under this Act shall, after the effective date of this subsection".

"that in no case shall this subsection require", and so on.

Now that is the language that is used throughout this Act in all other matters.

Then when we come to this section in regard to the subject matter of the jurisdiction—and, incident-

tally, if the Court please, let me remind you of what I said before. This litigant is in court. He wants to be heard before this Court—this Court in his territorial jurisdiction. He does not want [199] to file an action back in Washington and have them come out here. And that was one of the things that was argued before Congress when all of this was being considered and people were arguing, there was this man from down in Boston. Senator Taft called attention to the fact that this litigant in Boston had to come down to Washington to file his case, and there was being discussed the right of a litigant to litigate in his own court, so here is what they wrote into the law:

“any person aggrieved by any action of any agency, department, officer, or employee of the Government, contrary to the provisions hereof”—provisions hereof means what?—“or by the failure to act”—by the failure to act—“act of any such agency, department, officer, or employee, may petition the District Court of the district in which he resides or has his place of business for an order”, and so on.

The language used there is as sweeping and as comprehensive as by itself it possibly can be, the word “any”.

Now this opinion concludes, the last one—the rest of them are just of course ipse dixit, “I saw it, therefore it is so”; but the fourth one, or the “e”, to hold that subsection or paragraph (m) conferred jurisdiction upon the District Court to pass upon

the validity of regulations, you raise the very question of lack of uniformity of construction by the various District Courts which was said to be avoided by the creation of the Emergency Court of Appeals. [200]

Well, if the Court please, this case can't have a counterpart in New Hampshire, Georgia, or even in California. This case is peculiar to the State of Oregon and the State of Washington, the southern part of the State of Washington. This is a case that only this Court needs have to consider the facts in or apply the law to. There does not have to be any uniformity as to this case. It never will arise in any other court, in any other territory in the United States, so there is no necessity for asking or for claiming this Emergency Court of Appeals should have jurisdiction on the basis of uniformity. That cannot arise. This is a case that, as I say, will only be addressed to this one Court.

So we submit, if the Court please, that in construing the jurisdiction of a court, if you are going to exclude a right it should be so specific that the Court can have no question about it. If otherwise the Court has jurisdiction over this particular matter the Court should not be excluded because of the argument that has been advanced here, or the statements made in this opinion by this Court in Illinois.

The Court: How many witnesses do you gentlemen have?

Mr. Skulason: We have Mr. Norton here for a brief statement as to certain matters he didn't quite

fully cover, and then I have three others here, three or four, who will be very brief, your Honor, under our allegation that the defendants are threatening to invoke the sanctions of the Act against our [201] client.

The Court: Will you put them on.

Mr. Skulason: Mr. Norton, will you take the stand, please.

PLAINTIFF'S EVIDENCE IN CIVIL NO. 2575

C. W. NORTON

was thereupon recalled as a witness in behalf of the plaintiff and, having been previously sworn, further testified as follows:

The Clerk: Will you state your name, please.

The Witness: C. W. Norton.

Mr. Skulason: He has been sworn.

The Court: He has been sworn in this case.

Mr. Skulason: Would it aid your Honor in any way if I would briefly outline the complaint?

The Court: Yes.

Mr. Skulason: This was a suit brought by the Northwest Poultry and Dairy Products Company against Chester Bowles and others, and the grounds of the complaint, very briefly stated, are that this plaintiff has been engaged as a wholesaler, processor and purchaser of turkeys in Portland, Oregon, for the last twelve years, and that until the issuance of the regulations that have been attacked here, which followed certain practices, cost practices and

(Testimony of C. W. Norton.)

methods in that business which had been established in that industry by this plaintiff and others in the industry, and goes on to say that during that period [202] it had been the business practice and cost practice and method of wholesalers in this locality, and processors and purchasers of turkeys, to haul and pick turkeys for the growers on a per-head basis, and that during the latter part of the period the practice and custom had been to make a charge of 30 cents per head for picking toms and 22 cents per head for picking—no—yes, picking hens 20 and toms 22 cents, plus 3 cents for hauling, making a charge for picking and hauling of 23 cents for hens and 25 cents for toms.

Now that was the price, and this billing is here in view of the provision of the Act to the effect that settled and established business practices shall not be disturbed.

Then it goes on to say that in 1943 the wholesalers, etcetera——

The Court: Excuse me, Mr. Skulason. (The Court here conferred with Judge Fee.) Proceed, Mr. Skulason.

Mr. Skulason: I was saying, your Honor, in 1943 the wholesalers and processors raised this charge for picking and hauling per head to 25 cents and 28 cents, respectively, and that thereupon the OPA claimed that this was a violation of the Emergency Price Control Act and ruled that the service charge should be reduced to the former figure, 23 and 25.

(Testimony of C. W. Norton.)

I am sure your Honor understands what I am saying about that.

Then there was a ruling established in November of 1943 [203] to the effect that the processor or wholesaler was prohibited from purchasing dressed turkeys from the grower, although this had been the uniform custom in the locality mentioned for many years, which meant that he should not pay the ceiling price fixed by the Office of Price Administration but dress turkeys and charge the growers for the service of picking and hauling them, and this ruling, it is alleged, ignored and disrupted the custom and practices in the trade, in the business.

Then later this was changed again in November, 1943, to the effect that the processors, who had dressed turkeys for farmers, might continue to buy the turkeys on a dressed basis providing they did not exceed the ceiling of dressed turkeys, and this, according to the complaint, brought some order and clarity out of the confusion that existed, and the plaintiff and others in the same business went ahead and complied with those regulations as those changed, as best they could, and were going on in that way until in May, on the 2nd of May, 1944, this Order G-93 came out, which changed the service charges from a per-head basis to a per-pound basis.

Your Honor will recall the testimony that came in there from Mr. Norton and the gentleman from Seattle, in which they explained how high a charge that came to be on the average weight of turkeys, and this Order G-93 was accompanied by what we

(Testimony of C. W. Norton.)

have designated as Exhibit B here, in which it was stated that this was a fixed price for the service; not a maximum [204] price, nor a minimum price, but both combined, an absolute fixed price, and warned the people in the business that any charge of more than this amount per pound would be a violation of the Act and any charge of less would likewise be a violation, and threatened consequences that might follow from such violation.

Now your Honor will remember that gentleman from Seattle, Mr. Perry, I think his name was——

The Court: Perry.

Mr. Skulason: He said that it came to as high as \$1.05 a head on turkeys that he was handling, that he was compelled to charge the grower.

Now we have attacked this order, and with the interpretation that has been appended to it, on various grounds, that it is not general in its application, it applies only to a certain small portion of the country, Washington and Oregon, with the exception of the County of Malheur, according to Exhibit B, and that it is in a sense confiscatory; that it violates constitutional property rights, and that its enforcement would result in putting my client and those in a similar position out of business, because the growers would not sell them turkeys if they were charging such a large amount.

Now we also say it is discriminatory because the cooperative associations engaged in the same business could [205] comply with this order, because they were allowed, and are allowed, to return to

(Testimony of C. W. Norton.)

their members, by way of a dividend, a certain portion of this charge, so as to remain on the basis that they were on before this order came out. The result would be that the grower would join a cooperative or deal with a cooperative and he could get his money back by way of a dividend, while people in the position of the plaintiff here could not.

Now this was very emphatically impressed upon the Office of Price Administration, and the result was the issuance from Washington of an order, which, in effect, modified this G-93, as explained and amplified by Exhibit B, by permitting the plaintiff and those in a similar position to enter into agency contracts with the growers.

With the consent of counsel I mailed to your Honor a copy of that regulation, which you may not have had time to look at. And they were permitted then, if they acted as agent for the growers, to divide the premium with the grower, putting people in the position of my client I think substantially on the same basis as the cooperatives. So that is the situation there.

But now there was still another order issued, changing the amount to be charged per pound. But we are very far from being out of the woods, your Honor, in this case, because under Order G-3 they undertook to define who is a wholesaler and prescribe certain regulations concerning that, and the effect [206] is—I won't take the time to explain it; I will allow Mr. Norton to explain it—the effect

(Testimony of C. W. Norton.)

under that provision is that the plaintiff here is practically put out of business because it always has acted as a wholesaler and now under this G-3 it is no longer permitted to act in that capacity.

Let me refer to it further. That was issued on August 30th, 1944, and in that order are found certain definitions of wholesaler, and it is said that this designation means any person who processes all of the characteristics mentioned in the order, among which is that he must customarily sell and distribute at least 75 per cent of his dollar volume of poultry items, exclusive of sales to the United States Government, or any agency thereof, for ultimate consumption within a radius of 100 miles from his place of business.

Mr. Norton testified somewhat along that line before, but I shall ask him, with permission of the Court, some further questions about it, as to how that operates and affects his business.

Finally, we claim, your Honor, that we have done the best we could. We have acted in the utmost good faith in carrying out these regulations. Mr. Norton is himself a member of the National Board controlling these things, and that we have approached the matter and dealt with it in a sort of complete cooperation, so far as it was possible to cooperate, but it has come to a place where it is destroying the business [207] of this plaintiff.

And then we finally plead that the defendants are actually attempting to enforce these orders and are threatening to invoke against the plaintiff the

(Testimony of C. W. Norton.)

sanctions and penalties of the Act, and in support of that statement we have here the witnesses I mentioned a while ago.

We shall show to your Honor that they have sent their representatives into the field. They have issued orders somewhat similar to subpoenas, demanding a complete report of business done with my client. They have centered on my client. They are trying to build up a case against this company, and they have also made certain threats to Mr. Norton himself. He was told by a representative of this office that if he attempted to deal as a wholesaler with his turkeys any further, that he would be sued for damages and that he would be prosecuted criminally.

Now that is the situation, as I understand it to be here, and if I have made clear to the Court the substance of what our case is I will go on with the testimony and not go over the same ground, as we went over before.

Direct Examination

By Mr. Skulason:

Q. Mr. Norton, I want to ask you some questions about G-3. You know what I am referring to?

A. Yes, sir. [208]

Q. You are familiar with the terms of that order?

A. Yes.

Q. Will you state to the Court how you understand it applies to you and your business and the business of the plaintiff here.

(Testimony of C. W. Norton.)

A. Well, both of these orders are regional orders emanating out of San Francisco. There are national orders covering both of them, which are worked out by a board that is appointed by the National Office of the OPA and the War Food Administration. The interpretation of the order No. G-3 was given me. The difference between the national order and the local order is simply this: The national order says that 75 per cent of your merchandise must be sold for ultimate consumption within a radius of 200 miles. This order, as explained to me, says that if you dress 75 per cent of the merchandise you sell, then you must sell that within a radius of 100 miles. The difference between the two, as I say, is one—if you sell 75 per cent of the merchandise that you handle within a radius of 200 miles you are a wholesaler, but in the other, if you dress 75 per cent of the merchandise you sell you are a processor. That might mean a small butcher shop, as far as I understand the order, if he dresses 75 per cent of the chickens he puts out over the counter, and the difference between a processor and a wholesaler is a cent and a half a pound, and if we are denied the privilege of acting as a wholesaler, which we have ever [209] since we started into business, that cent and a half a pound must come out of the grower.

Q. How does that affect—

Mr. Wetherall: We object to the testimony, your Honor, on the ground that it is incompetent, irrelevant and immaterial; and on the further

(Testimony of C. W. Norton.)

ground that the matters testified to are not properly within the jurisdiction of the Court.

The Court: It will remain, subject to the objection.

Mr. Wetherall: And may it be understood that this objection we are making now be considered a blanket objection to any and all further testimony of the witness along the same line?

The Court: It is so understood. It will all be heard, subject to the objection.

Mr. Skulason: Q. Now Mr. Norton, explain to the Court exactly how this affects you and what dealings you have had with the OPA representatives here regarding your acting as a wholesaler of turkeys recently.

A. If that is done it means just one thing—that there will not be any turkeys for the civilian trade in the States of Oregon or Washington at Thanksgiving time. The reason for that is the Washington, D. C., office granted us permission to act as agent for the sale to the Federal Government of turkeys as the embargo lifted at Washington, D. C., at 12:01 last Saturday night, and we had to sell certain quantities of turkeys to the Government. [210]

The Court: Have him slow down.

Mr. Skulason: Don't talk quite so fast, Mr. Norton, please.

The Witness: Pardon me. We had to agree, all wholesalers—I mean, all processors and wholesalers had to agree to deliver turkeys to the Federal Government over a period of four months. In our

(Testimony of C. W. Norton.)

case we had to sign up for delivery six million pounds of turkeys between now and the end of February. On those turkeys, acting as agent for the grower, we can net the grower a cent a pound more than what we can net the grower in sales under the regional OPA order. Consequently all of the turkeys must go to the Government in order to protect the growers since these orders are out.

Q. Now then, I don't quite understand what you refer to there where you spoke of the amount netted to the grower of turkeys sold otherwise than to the Governmnet. Explain that, please.

A. That is, if we were selling, under G-93, the net price to the grower on today's basis would be one cent less than acting as an agent for the grower and selling to the Federal Government. Consequently all of our turkeys, and all of the other dealers' turkeys, must go to the Federal Government, and we have a Retail Meat Dealers Association, Hotelmen's Association, Restaurant Association, Fred Meyer's organization, Safeway's Organization, that will have to be without turkeys for Thanksgiving under this present regulation.

Q. Now did you have a conversation with some member of the OPA [211] office here about this matter of selling turkeys to some particular customer?

A. We have every year an order for the Continental Motors Corporation, which is a gift for Christmas, and we secure a letter from the local

(Testimony of C. W. Norton.)

office of the OPA to the effect that we can fill that order. The order calls for 25,000 head.

Q. You would fill that as an order, would you?

A. Last year we were given a letter from the OPA office. This year we were told if we acted in that capacity we would be prosecuted criminally.

Q. Who told you that?

A. Mr. Freebourn.

Q. Who is he?

A. Attorney for the OPA here in Portland.

Q. How did you happen to have that conversation with him?

A. I called and asked for a duplicate letter, similar to the one written to me last year by Miss Cooper.

Q. You called him about it?

A. I called and asked for a letter of authorization.

Q. Giving you permission to fill this order?

A. To fill this order.

Q. And did he write you about it?

A. He did not. He said he would not give a letter on it; that he would prosecute us criminally if we acted as a wholesaler in the case. [212]

Q. Now your business, aside from processing turkeys has that ever been that of wholesaling?

A. That is the way we built our plant, the way we have to act as wholesaler in this district.

Q. You are not a retailer at all, are you?

A. Not a retailer.

(Testimony of C. W. Norton.)

Q. Well, if you can't wholesale your own turkeys, what is going to be the effect on your business?

A. Well, we can't operate, if we are a wholesaler. We are listed in the directory as a wholesaler, and we have taken care of this district for the last twenty years. The organization before I came here was in the same business.

Q. You can't carry on unless you are allowed to operate as a wholesaler, then?

A. That is correct.

Q. Well now, let's go into it a little further. Couldn't you sell turkeys under this G-3 within the 100-mile radius and keep on doing business?

A. Not as a wholesaler, under G-3. They are attempting to close us as a processor and a processor has no market. A wholesaler has a market, and a cent and a half a pound, and if we had to act—if we had to put somebody in between us, put somebody else in business in between us and the meat market, we would have to take our margin of profit out of the grower and it falls right back in his lap. We were definitely told, or [213] given to understand at meetings with the OPA, those two orders went together, that the G-3 order would force us to abide by G-93.

Q. What have you actually done there regarding this matter?

A. After your conversation with Miss Gallagher on G-93 we are operating on the agency agreement

(Testimony of C. W. Norton.)

and we have no turkeys to sell anybody excepting the Government.

Q. As to G-3?

A. As to G-3, we are still operating as a wholesaler of turkeys. Our turkeys are all going to the Government.

Q. And on what basis did you conclude that you would do that—would continue to do that?

A. I had a letter from you telling me to continue on that basis until we had a decision from the Court.

Mr. Skulason: If your Honor please, Mr. Henderson and I considered that matter and we advised him, under the circumstances, to continue as he had until this matter was settled. So I want to make it clear, he is acting on our advice, as far as that is concerned. We could not see any other way out than to shut his business down.

Q. Mr. Norton, since the last hearing here I think you explained—by the way, you explained about that difference in the effect of 100-mile radius and 200-mile radius, didn't you, before?

A. Yes.

Mr. Skulason: I think your Honor probably remembers that. [214] It is in the record anyway.

Q. Now since the last hearing here, what knowledge have you, if any, as to what the Office of Price Administration is trying to do to force you to comply with these orders?

A. Well, they have contacted, to the best of my knowledge they have contacted every turkey grower within a radius of 50 miles or 60 miles of Portland.

(Testimony of C. W. Norton.)

I don't know that they have been any further away than that, but they have contacted all of them. There has been as high as five men in the field and they have been subpoenaing the records of the growers and telling them they were subject to prosecution if they accepted less than a certain figure for the packing and hauling.

Q. This is according to certain information that has come to you? A. That is correct.

Q. And there are witnesses here on that point, aren't there, Mr. Norton? A. There are.

Q. Mr. Norton, have you done anything in the conduct of your business, made any changes in the way you have been doing your business to call for this change in the way you should conduct your business, not as a wholesaler but as a processor only? Do you know any reason for these orders for this classification they made in your case?

A. I can't—rather, there has been no change in my method of [215] doing business with anyone else in the area. We have continued about the same as we have ever since we have been in business. There has been no change in the method of operating. The only change in the method of operating is that the Government is taking more of our merchandise today than what they did previously.

Q. Well, would that have any effect upon your business?

A. That would have no effect upon our business. It is just that we share with the Government a cer-

(Testimony of C. W. Norton.)

tain percentage of our output rather than all going to civilians. There is no change in the method of doing business.

Q. Do you know of anything that has occurred there in what you have done, or not done, or what has occurred generally, that would call forth this classification—this change?

A. There has been nothing in either of these states that would call for the issuing of either of these two orders, to my knowledge.

Q. Now you are on the Board and you are quite familiar with all of these regulations, aren't you?

A. Well, the Board was set up and we sit in with the War Food and the OPA Board. It is composed of four members on the Pacific Coast, who represent the eleven western states, and the balance of them are strung out through the rest of the United States. This is the industry board and we set in one the writing of these regulations, which we do on the national order, [216] but in this case this is a regional order issued out of San Francisco that does not have a board and it supercedes the national order.

Q. That is permitted to supersede the national order?

A. It attempts to supersede the national order. Both of these regulations are covered in the national order but this is something set up different for our particular little community here.

Q. Yes. Under the national orders you can still operate as a wholesaler, can you?

(Testimony of C. W. Norton.)

A. That is true. That was the understanding.

Q. Under the national order you could still sell within a radius of 200 miles?

A. Still sell within a radius of 200 miles, and we could still charge the same for picking and hauling that we charged for the past ten years.

Q. So this, as I understand it, comes solely from the regional office at San Francisco?

A. Solely from the regional office.

Q. Contrary to the national orders and regulations?

A. And I am advised by the War Food and the OPA at Washington, that the reason we are acting as agent for the grower to sell to the Army is to circumvent these two orders out of San Francisco so as to get turkeys for the boys overseas.

Q. The order also allowing you to act as agent didn't come from the San Francisco office? [217]

A. From Washington, D. C., and it was received by the local office on the 27th day of September and our hearing date was on the 6th, and they claimed they didn't have such an order in their offices.

Q. You have acted under that modification, haven't you?

A. Acted under the agency agreement ever since the last hearing, 100 per cent so far as turkeys are concerned.

Q. 100 per cent?

A. That is correct.

Q. And you are doing that now?

(Testimony of C. W. Norton.)

A. Doing that now, and will continue to do it until those regulations are changed.

Mr. Skulason: You may cross examine.

Mr. Wetherall: Without receding from our position in the matter, namely, that the Court has no jurisdiction to consider questions of validity, I should like to ask the witness one question, which I believe would more properly come as cross examination involving testimony given at the previous hearing.

Cross Examination

By Mr. Wetherall:

Q. Assuming, Mr. Norton, that you receive a lot of turkeys from a grower, you process those turkeys; after assembling and hauling to your plant you kill them, bleed them, pluck them, grade them, head-wrap them, chill them, performing all the functions described by Regional Order No. G-93 in order to entitle you [218] to the maximum service charge of 2.8 cents a pound therein prescribed, assuming that you do all that and that you buy dressed turkeys from the grower and sell them on the civilian market as a processor, without taking the cent and one-half a pound wholesale markup, and of course without receiving the one-cent-a-pound selling addition allowed on sales to the Government, under those circumstances, Mr. Norton, is it your opinion that the service charge of 2.8 cents a pound prescribed in the order is excessive or too high?

A. I am not sure I get just what you mean.

(Testimony of C. W. Norton.)

You mentioned cooling, headwrapping, and so forth. Nearly all of the turkeys that we buy are bought as they come off the line, on the hot weight. The grower's interest in the turkey ceases the minute that that bird is graded off the line. From there on the bird loses its identity and the grower ceases to have any interest in that bird. Now for the service up to that point 2.8 is definitely too high. The charge we were making previous to this order coming out was 23 cents on the hens per head and 25 cents per head on the toms, and we raised last fall, which was brought out, 2 cents on the hens and 3 cents on the toms and paid a fine to this office for raising and went back to the 23 and 25 cents. At that time our cost showed that up to the point where that bird was graded from the grower it took 25 cents on hens and 28 cents on toms to cover the out-of-pocket money charge on that transaction. From there on—now wait a minute—the [219] cooling, if we were selling civilians, many, many times the birds are taken out of our place hot. They are not even precooled. How could you charge a grower for pre-cooling if you didn't do it?

Now in the case of grading, the Government is grading every one of our turkeys at the present time themselves. There is no expense to us for grading. The Government is doing that grading. They have a man in each of our plants and they are grading the birds. The grading on the line upstairs is done by one of our own men, own graders, and from those birds we deduct one per cent for hot

(Testimony of C. W. Norton.)

weight and that takes care of the shrink between hot and cold.

Does that answer the question? It is a round-about way.

Q. I appreciate your answer. I think perhaps I was misunderstood. The situation presented is one where you would not be selling to the Government and, therefore, would not be receiving the cent-a-pound selling addition allowed on sales to the Government but you would be selling the dressed turkeys at the ceiling price applicable to the processor, to a civilian buyer; in other words, a situation where you would process the live turkeys for the grower and buy them after they had been processed from the grower and in turn sell them on the civilian market. Now in that type of situation do you think the maximum service charge prescribed in Regional Order G-93 of 2.8 cents a pound is [220] excessive to cover your operation?

A. I think I can better explain that in this way: That if I am acting as a custom processor and do not take title to the birds, my profit then has to come out of that one only item, if I am acting as a custom processor.

Q. Yes. A. Which we do not do.

Q. Well, let's assume that situation then, Mr. Norton.

A. Assume that the situation is I am a custom processor and do not take title to the turkeys in any way, shape or form, the grower takes them out of the plant?

(Testimony of C. W. Norton.)

Q. Yes.

A. Then I would have to take my profit out of the grower.

Q. You think then that the 2.8 is excessive?

A. Well, for the entire service—for that service, if I am acting as a service processor and do not take anything else from the turkey, 2.8 is not out of line.

Q. Is not out of line?

The Court: Do you want to put on these outside witnesses, so some of them can go home? It is evident that some of them will have to go on this afternoon.

Mr. Skulason: Yes. Before I do that I want to offer two exhibits here, when counsel is through. Are you through?

Mr. Wetherall: That is all.

Mr. Skulason: Yes. Mr. Bailiff, please show the witness [221] these two exhibits.

The Court: Mr. Norton, let some of these other people get up here so they can get back to what they have to do. Let's use this half hour for some of your outside witnesses.

Mr. Skulason: Yes. I was simply going to offer two exhibits; then I am through with him.

The Court: Yes. Well, I am not sure that you are through with him.

Mr. Skulason: All right. Well, go on then. That is all right. Bring them back.

(Witness withdrawn.)

Mr. Skulason: Mrs. Smith, will you take the witness stand, please.

ROSE M. SMITH

was thereupon produced as a witness in behalf of the plaintiff in Civil Action No. 2575 and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Skulason:

Q. Will you state your name, please.

A. Rose M. Smith.

Q. And where do you live?

A. Oswego.

Q. What is your occupation?

A. Truck grower. [222]

Q. And are you married? A. Yes.

Q. Your husband's name? A. Arthur H.

Q. Is he in the truck business with you?

A. Well, yes. He is a contractor also.

Q. Yes. Do you recall that someone from the OPA office called on you on last September, regarding your dealings with Mr. Norton's Company?

A. Yes.

Q. Just when did that occur?

A. Well, I really don't remember the date. It is down there. I wrote that the day after he came.

Q. September 27th is the date in this letter.

A. That would be the date, yes.

Q. And who was it? Do you know his name?

(Testimony of Rose M. Smith.)

A. Well, Mr. Rodemack, Rodeman, or some such name as that.

Q. Rodeback, isn't it?

A. Rodeback. That is right.

Q. What did he say to you?

A. Well, he wanted to know who we sold to. When I told him he said to me, "Why don't you deal with somebody honest, somebody like Clark Brothers?"

Q. You told him you were dealing with Mr. Norton's company?

A. Yes. When he came he wanted to know if we had sold our [223] turkeys.

Q. And did he go into any details about honesty, or lack of it, in Mr. Norton.

A. Yes, he did infer, said that Mr. Norton or the Northwest Poultry wasn't any good, we would get a very much better deal if we dealt with Clark Brothers or somebody else.

Q. Did he say anything about the charges Norton was making?

A. He wanted to know how much we had paid and we wouldn't tell him.

Q. How much you had paid Mr. Norton's company?

A. Yes; for the killing and hauling.

Q. Did he ask for your records, and books, and things? A. Yes. He wanted our records.

Q. Did you give them to him?

A. We did the following day, or shortly after that.

(Testimony of Rose M. Smith.)

Q. Did he say anything about how Norton had treated the growers?

A. Well, yes, he did. He was telling—do you want me to go into detail?

Q. Yes, please.

A. Well, one instance he was telling about some flock of turkeys that we had just—it was a huge amount and he had just taken a car and driven right down the center of the flock and divided it in half, and he sold the first half to Clark Brothers and they kept the other half for two weeks longer and when he sold that in that way he figured he would make a great deal more [224] than when he had sold to Clark Brothers, because he had kept the turkeys two weeks longer, and when he got the receipts from the Northwest it was less than what he had received from Clark Brothers.

Q. In addition to mentioning his lack of honesty, did he say anything further about his business practices, as to whether or not they were fair or just?

A. Well, all through his talk he inferred that he wasn't honest, but towards the end when he—well, we had looked into Northwest Poultry and we had never heard a derogatory remark about them, and when we heard—you know, I thought they were perfectly honest; then he did change and then he was—he had lost the inferring that they were dishonest.

Q. Did he give any reason, say anything as to

(Testimony of Rose M. Smith.)

what the OPA office, or someone in San Francisco, was trying to do to Norton?

A. Well, he inferred, or did say, I guess, that this wasn't a Government—what do I want to say? It was really they were trying to get him from—

The Court: Well, that is enough, I guess. We will pass that up.

Mr. Skulason: All right, your Honor.

The Court: We will have to consider this question of authority sometime in the case, regional authority as opposed to national.

Mr. Wetherall: Incidenally, we assume our same line of objection made to Mr. Norton's testimony will apply to this witness. [225]

The Court: I understand.

Mr. Skulason: Q. Did he mention what Norton's company was charging you per head for processing turkeys?

A. Well, he wanted to know how much we were—how much he charged us for the pick and haul.

Q. Did you tell him? A. No, I didn't.

Q. How much was Norton charging, as a matter of fact?

A. Well, I believe it was 30 and 35, or I would have to look to be sure.

Q. 30 and 35 cents?

A. But they have the records.

Mr. Skulason: You may cross examine.

Mr. Wetherall: No cross examination.

The Court: That is all.

(Witness excused.)

Mr. Skulason: Mr. Leo Hardebeck.

The Clerk: Will you state your name, please.

Mr. Hardebeck: Leo Hardebeck.

LEO HARDEBECK

was thereupon produced as a witness in behalf of the plaintiff in Civil No. 2575 and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Skulason: [226]

Q. Where do you live, Mr. Hardebeck?

A. I live at Gaston.

Q. And what is your occupation?

A. Turkey raising and general farming.

Q. Are you acquainted with Mr. Norton and his company, the Northwest Poultry?

A. Yes, sir.

Q. Have you done business with them?

A. Yes, sir.

Q. How long have you been in this business you mention? A. Well, this is the second year.

Q. Now did anyone from the OPA office call on you on or about the 17th of last month?

A. Yes.

Q. Do you know who it was?

A. Well, I had his name on that paper.

Q. On this paper, Kallas and Schallinger?

A. Yes.

Q. And what did they say to you?

(Testimony of Leo Hardebeck.)

A. Well, they come down there and they said they were from the OPA, and they wanted to know what I thought about it. I said, "Well, I kind of figure it is all right, but it seems like they are going around getting into things that they shouldn't." And he asked, "Well, who are you selling your turkeys to?" I says, "Well, so far as I am concerned I am dealing with Northwest." [227] He asked me if I had always dealt with them. I said, "Yes." He asked me how much they was charging to haul and kill my birds. I told him, and he says, "Well, why do you deal with Northwest?" I says, "Well, I have always dealt with them. He has always dealt with me and give me a square deal. He has always been honest with me." And he says, "We are sending out here from the head office of San Francisco about this haul and kill proposition that has came up. We would like to know you farmers' viewpoint. We would like to have letters from you stating why you would rather haul and kill for 30 and 35 than take the 2.8." "Well," I says, "for one thing the 2.8 nets us more for our birds." He says, "Well, why should you—why do you figure that you should have the 30 and 35 haul and kill instead of the 2.8?" I told him, "The first thing, our pullets this year cost us 30 cents apiece more, and our feed has cost us a considerable more." Take the Government wheat, for instance, it jumped from I think \$1.04 or \$1.05 a bushel, in there some place, to \$1.30 a bushel, and I says, "There is the label." And I says, "On this 2.8 proposition we are not get-

(Testimony of Leo Hardebeck.)

ting as much for our birds as we got last year, for last year they paid a premium on hens." They said, "Well, we are going around here to rectify this. We are going to try to make a change. If you farmers had rather have the 30 and 35 we would like to have letters from you and we will send them down to the office, down at San Francisco, and we will see what we can do about it." [228] So I gave them a letter to that effect and stated that I would rather haul and kill that way than the other way, and gave them the reasons. And I had previously sold one truck load of birds the month before, just kind of as a test load or so, more to see how they would kill out, and he wanted to see the papers of that load and I didn't let him have them. So he took the letter, and my brother happened to be there at that time, so he started to ask him questions, and everything, but he didn't sign any letter. So my brother left my place right away and went up to his place, where he lived, and up there was another set awaiting for him to come home to ask him questions.

Q. Did those men, or one of those men, serve on you any paper?

A. Not at that time. That was Saturday—that was Friday when he was there, so the next Saturday—well, that was the first day they took a load—two loads of turkeys. They were going to send them out on Saturday, so Saturday I went down there to see how the toms and hens were dressing out, and

(Testimony of Leo Hardebeck.)

as soon as I walked into the office Ryals told me, "Well, there is a new deal come through today."

Q. Who is Ryals—in whose office?

A. Well, in the Northwest office. And he says, "There is a new deal come through today, so that shoots you along next on the range and there is no charge for haul and kill." He says, "That will give you about the same deal as we have charged, 30 and 35." [229]

Q. That is the agency arrangement, isn't it?

A. Yes.

Q. But now you did get from the office here a certain paper, didn't you?

A. Yes. That was the next week afterwards they come through. There was three of them. One of them stayed out in the car and the other two came up to the house and demanded my papers of my birds that I had previously sold. I says, "These papers of birds that I am selling now I haven't got yet." And he says, "Well, what kind of a deal are they giving you?" I says, "Well, I went in the office there the other day and they said a new deal has came through," and he says, "Is that the OPA order?" I says, "Well, he gave me an idea it was an OPA order." And he said he didn't know anything about the deal being changed, or the price ever being changed at all. He didn't know a thing about it. He argued the point with me.

Q. Well, you received that paper, didn't you?

A. Well, he demanded to see my papers of the previous load of birds I sold. I said, "Well, what

(Testimony of Leo Hardebeck.)

do you want to see that paper for?" He said, "Well, we want to see that paper to see if Northwest is giving you as much for these birds as they should." I said, "Well, I am satisfied." I said, "It looks like you would be satisfied if I am satisfied." So I refused to give them any more information and he handed me that and said it was a subpoena I had to let him see these papers, but [230] I did not do it.

Mr. Skulason: Will you pass this paper to the witness?

Q. Is that the paper you refer to that he handed to you? A. Yes, it is.

Q. He handed it to you?

A. Well, it was either Kallas or Schallinger; I couldn't say which was which.

Mr. Skulason: Yes. I offer it in evidence and ask that it be marked.

The Witness: And at that time, sometime that afternoon, I had a hired man working in the field about 18 miles from there. They had a different set there asking him questions.

Mr. Skulason: I see.

(The Inspection Requirement directed to L. W. Hardebeck, dated October 17, 1944, so offered, was received in evidence and marked Plaintiff's Exhibit 1.)

(Testimony of Leo Hardebeck.)

PLAINTIFF'S EXHIBIT No. 1

OPA Form 2915-1

United States of America

Office of Price Administration

INSPECTION REQUIREMENT

To: Leo Hardebeck

Gaston, Oregon

In connection with an investigation to assist the Price Administrator, Office of Price Administration, in the administration and enforcement of the Emergency Price Control Act of 1942, as amended, and especially of the following:

Revised Maximum Price Regulation-269 as amended.

Regional Order G-93 as amended and

Regional Order G-3 as amended

You Are Hereby Forthwith Acquired to Permit Peter T. Kallas and Ernest Schallinger, representatives of the Office of Price Administration to inspect at your place of business the following documents:

All statements of account, manifests, weighing-in slips, bank drafts, bank deposit slips, letters, telegrams and all other documents in connection with all sales of turkeys made by you to the Northwest Poultry and Dairy Products Company of Portland, Oregon, or its branches from September 1, 1944 to and including October 17, 1944.

and to permit the aforesaid representatives of the Office of Price Administration to copy all or any part of the said documents, and

(Testimony of Leo Hardebeck.)

You Are Further Required to Permit the afore-said representatives to inspect the following:

now in your possession or under your control.

Issued this 17 day of October, 1944, at Portland, Oregon.

[Illegible]

Acting District Director

Sections 202(a) and 202(b) of the Emergency Price Control Act of 1942 (Public Law 421—77th Cong., chapter 26—2nd Sess.), as amended, authorize the Price Administrator to make such studies and investigations of price and rent matters as he deems necessary or proper to assist him in prescribing any regulation or order under the Act, or in its administration or enforcement, and to require any person who is engaged in the business of dealing with any commodity, or who rents or offers to rent or acts as broker or agent for the rental of any defense housing accommodations, to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of such housing accommodations. Under Section 4(a) of the Act, wilful refusal to obey this inspection requirement is a violation of the law, and under Section 205(b) any person guilty of such violation will be liable to a fine of not more than \$5000.00 or to imprisonment for not more than one year, or both. Under Section 205(a) such violation may also cause the issuance of a court order, the

(Testimony of Leo Hardebeck.)

disobedience of which will render a violator subject to punishment for contempt of court.

RETURN OF SERVICE

I certify that a duplicate original of the within Inspection Requirement was duly served*

[] on the person named therein.

[] by leaving the said original at the principal office or place of business of the person named therein, to wit, at: on the day of, 194...

.....

(Person making service)

.....

(Title)

*Check method used.

Mr. Skulason: You may cross examine.

Mr. Wetherall: No cross examination.

The Court: Step down.

(Witness excused.)

Mr. Skulason: I will try to make this next short and get through with these two witnesses, your Honor. Mrs. Rowe, please.

The Clerk: Will you state your name, please.

[231]

The Witness: Mrs. Jack Rowe.

MRS JACK ROWE

was thereupon produced as a witness in behalf of the plaintiff in Civil Action No. 2575 and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Skulason:

Q. Where do you live, Mrs. Rowe?

A. I live at Yamhill.

Q. And is your husband here in the courtroom?

A. He is.

Q. You are in what business?

A. Turkey business.

Q. How long have you followed that?

A. Twelve years.

Q. Have you dealt with Mr. Norton and his company?

A. I have dealt with no one but Mr. Norton's sons.

Q. During all of that time?

A. All of that time.

Q. Did anyone from the OPA office call on you recently about his business—Mr. Norton's, and his company's business?

A. Yes. We have had two phones from the people.

Q. Will you tell us now briefly what they said to you?

A. Well, I think my testimony will be about the same routine, "Are we satisfied, or are we sure that we are getting a better [232] deal from the Northwest?" "Are we sure that we are doing right in

(Testimony of Mrs. Jack Rowe.)

doing what we are now with the price, if the price were at 2.8," or whatever it were. In the first instance, we didn't know until we were informed by them of them, but that would have no special bearing on where we were killing anyway.

Q. Did they say anything to you about the consequences to you if you continued to sell to Mr. Norton?

A. Well, I think that I probably understood that we were under the same rigamarole as what is going on now. My opinion is that all of us growers, but it might be just a personal opinion, I won't say it was explained thoroughly to me, that we were still under that setup until this thing was cleared up definitely where we would have to pay the regular price, or not—something like that.

Q. Did he say anything to you as to whether you should continue to deal with Norton's company?

A. No, he didn't, because we were killing our last birds the day they were there. They were all hung up.

Q. Was your husband present when these conversations took place?

A. He was for part of one conversation. The other part he wasn't.

Q. Was there sent to you, or delivered to you, any paper called an inspection requirement?

A. Yes. And I also give them—they asked for a statement also of an early kill we have, and they have a statement as to the [233] weights, price and grade of a lot of turkeys there.

(Testimony of Mrs. Jack Rowe.)

Mr. Skulason: Yes. Hand this to the witness, please.

(Paper passed to the witness.)

Q. Is this the paper they gave you?

A. Yes, it is.

Mr. Skulason: I offer it in evidence, your Honor.

The Court: It is admitted.

(The Inspection Requirement addressed to E. J. Rowe and Lilly M. Rowe, so offered and received, was marked Plaintiff's Exhibit 2.)

PLAINTIFF'S EXHIBIT No. 2

OPA Form 2915-1

United States of America

Office of Price Administration

INSPECTION REQUIREMENT

To: E. J. Rowe and Lilly M. Rowe

Route 2

Yamhill, Oregon

In connection with an investigation to assist the Price Administrator, Office of Price Administration, in the administration and enforcement of the Emergency Price Control Act of 1942, as amended, and especially of the following:

Revised Maximum Price Regulation-269 as amended

Regional Order G-93 as amended, and

Regional Order G-3 as amended

You Are Hereby Forthwith Required to Permit Peter T. Kallas and Ernest Schallinger, representa-

(Testimony of Mrs. Jack Rowe.)

tives of the Office of Price Administration to inspect at your place of business the following documents:

All statements of account, manifests, weighing-in slips, bank drafts, bank deposit slips, letters, telegrams and all other documents in connection with all sales of turkeys made by you to the Northwest Poultry and Dairy Products Company of Portland, Oregon, or its branches from September 1, 1944 to and including October 17, 1944.

and to permit the aforesaid representatives of the Office of Price Administration to copy all or any part of the said documents, and

You Are Further Required to Permit the aforesaid representatives to inspect the following:

now in your possession or under your control.

Issued this 17 day of October, 1944, at Portland, Oregon.

[Illegible]

Acting District Director

Sections 202(a) and 202(b) of the Emergency Price Control Act of 1942 (Public Law 421—77th Cong., chapter 26—2nd Sess.), as amended, authorize the Price Administrator to make such studies and investigations of price and rent matters as he deems necessary or proper to assist him in prescribing any regulation or order under the Act, or in its administration or enforcement, and to require any person who is engaged in the business of dealing with any commodity, or who rents or

(Testimony of Mrs. Jack Rowe.)

offers to rent or acts as broker or agent for the rental of any defense housing accommodations, to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of such housing accommodations. Under Section 4(a) of the Act, wilful refusal to obey this inspection requirement is a violation of the law, and under Section 205(b) any person guilty of such violation will be liable to a fine of not more than \$5000, or to imprisonment for not more than one year, or both. Under Section 205(a) such violation may also cause the issuance of a court order, the disobedience of which will render a violator subject to punishment for contempt of court.

RETURN OF SERVICE

I certify that a duplicate original of the within Inspection Requirement was duly served*

[] on the person named therein.

[] by leaving the said original at the principal office or place of business of the person named therein, to wit, at: on the day of, 194...

.....

(Person making service)

.....

(Title)

*Check method used.

(Testimony of Mrs. Jack Rowe.)

Mr. Skulason: Is there any cross examination?

Mr. Wetherall: No.

(Witness excused.)

Mr. Skulason: Mr. Rowe, please.

The Clerk: Will you state your name, please.

Mr. Rowe: Jack Rowe.

JACK ROWE

was thereupon produced as a witness in behalf of the plaintiff in Civil Action No. 2575 and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Skulason:

Q. Are you the husband of the last witness?

A. Yes. [234]

Q. And did you hear her testimony?

A. Yes, sir.

Q. And what have you to say? If you testified would you agree with what she said or not?

A. I would corroborate her 100 per cent.

Q. 100 per cent? A. Yes, sir.

Q. Did those men have any talk with you in the absence of your wife?

A. No, sir. Just both me and my wife.

Mr. Skulason: Yes. That is all.

The Court: That is all.

(Witness excused.)

The Court: Mr. Wetherall, did you want to get back to San Francisco this afternoon?

Mr. Wetherall: No. I am staying over, through tomorrow.

The Court: All right. Then we will resume at two. I would hasten the matter if he had to get away.

Mr. Skulason: Your Honor, on this type of testimony we have called only two witnesses but those are somewhat along similar lines. We, of course, could produce a great many more witnesses on this same line but it would be cumulative.

The Court: Come back at two o'clock.

Mr. Skulason: Yes. [235]

Mr. Wetherall: It is understood, I just want to make this clear, that our objection relates to the testimony of the last three witnesses as well as to the first two.

Mr. Skulason: Oh, certainly.

Mr. Wetherall: That is all right.

The Court: Recess until two.

(Thereupon, at 11:55 o'clock A.M., a recess was here taken until 2:00 o'clock P. M. of this day, Thursday, November 9, 1944, at which time Court reconvened and the following further proceedings were had herein:)

Mr. Skulason: I will call Mr. Frink.

The Clerk: Will you state your name, please?

Mr. Frink: Frederick W. Frink.

FREDERICK W. FRINK

was thereupon produced as a witness in behalf of the plaintiff in Civil Cause No. 2575 and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Skulason:

Q. You live in Portland, Mr. Frink?

A. I do.

Q. Have lived here for some time?

A. Six years.

Q. And your business, please? [236]

A. I didn't get the question?

Q. Your business?

A. I am a meat buyer for Safeway Stores.

Q. And are there several of those stores under your jurisdiction? A. Yes, there are.

Q. About how many?

A. Approximately 110.

Q. How many in this locality?

A. There are 45 in the City of Portland and the immediate vicinity.

Q. You buy the meat for those stores, you say?

A. That is right.

Q. Does that include buying turkeys?

A. That includes buying everything sold in the meat department, which includes turkeys.

Q. And you do handle turkeys?

A. Yes, we do.

Q. To a considerable extent?

A. Yes, quite a good supply.

(Testimony of Frederick W. Frink.)

Q. Handle turkeys, of course, then, for the holiday trade? A. That is right.

Q. Do you know Mr. Norton?

A. Very well.

Q. And the Northwest Poultry?

A. Yes, sir.

Q. Have you done business with him and his corporation in the past?

A. Ever since I have been in Portland I have.

Q. What have you bought from him?

A. We have bought practically all of our chickens and a good supply of our turkeys, that is, a good portion of our turkeys.

Q. From him?

A. From him. That is right.

Q. Are you buying from him now?

A. We are buying from him now. We are not buying any turkeys at the present time but we are buying other *turkeys*.

Q. Why aren't you buying any turkeys?

A. Of course we are not buying turkeys because the freeze has been on. At the present time Mr. Norton is not able to sell us any turkeys.

Q. Do you know why?

A. Well, I understand there is some controversy regarding the regulations. He claims, my understanding is, he is not permitted to sell us. I won't put it that way. He can't sell us because he is unable to get as much money from the retail firm as he can sell to the Government.

(Testimony of Frederick W. Frink.)

Q. And is that going to affect your ability to supply your customers with turkeys at all this season?

A. Well, we are really not sure. At least, at the present time [238] it does not look very bright for us.

Q. Aren't there other sources of supply?

A. Well, yes, there are others, but we are not able to get any demands from any of the other sources of supply. They all seem to be in the same predicament Mr. Norton's firm is in.

Q. Yes. Now couldn't you go out to the farmer, to the grower, and get your turkeys?

A. Well, that might be possible. We have never done that. That would be quite a problem, supplying as many stores as we have with the present facilities. Most farmers are not in position to do their dressing, and we certainly are not.

Q. The outlook then for the civilian trade, or the civilians getting turkeys at this time, how would you describe it, Mr. Frink?

A. The understanding I have at the present time does not look very good, unless something changes or something comes up that we know nothing about now.

Q. When do you begin to buy your turkeys for the Thanksgiving trade?

A. We intended to start buying on the 14th. In other words, next Tuesday.

Q. What is the latest date you could start buying and get them?

(Testimony of Frederick W. Frink.)

A. The latest date that we should have at least a portion of our turkeys in to our markets would be the 17th. That would be the very latest we should have them. [239]

Q. Of this month?

A. At least half of them in.

Q. But how soon—what is the latest date you could place an order and have an order accepted for your holiday trade? Is there still time for that?

A. Well, to be quite frank with you, we are going to have to get some accepted or we are going to be in a bad way here. We haven't all of our orders accepted.

Q. In your business you do supply your customers with turkeys for Thanksgiving, don't you?

A. That is right.

Q. And also for Christmas?

A. That is right.

Q. And is the present any better for the Christmas trade than for the Thanksgiving trade now?

A. No, it is not.

Mr. Skulaton: Not any better. You may take the witness.

Mr. Wetherall: We move to strike all of the testimony of this witness on the same grounds as were advanced this morning in connection with the five witnesses who then testified for the plaintiff.

The Court: Motion denied.

Mr. Wetherall: No cross examination.

The Court: He may be excused. Thank you.

(Witness excused.) [240]

Mr. Skulason: Mr. Carlson, will you take the stand, please.

The Clerk: State your name, please.

Mr. Carlson: Harold E. Carlson.

HAROLD E. CARLSON

was thereupon produced as a witness in behalf of the plaintiff in Civil Action No. 2575 and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Skulason:

Q. Mr. Carlson, are you a resident of Portland?

A. Yes, sir.

Q. And how long have you lived here?

A. Approximately twenty-two years.

Q. And what occupation are you in?

A. I am Secretary of the Independent Meat Dealers Association.

Q. What is that organization?

A. Well, it is a trade association, representing the retail meat dealers of Oregon, and Portland particularly.

Q. Is it a large association?

A. We represent in Portland approximately 200 retail meat dealers, in Portland.

Q. By the way, you say you are Secretary?

A. Yes, sir.

Q. Now as such have you anything to do with buying turkeys?

(Testimony of Harold E. Carlson.)

A. No, sir, not directly, only through assisting the individual [241] meat dealers.

Q. Yes. Do you know anything about the present situation as to the probabilities of getting turkeys for the civilian trade for Thanksgiving here?

A. Well, I do know that I have had numerous calls from meat dealers, stating that they are unable to buy any now, are unable to get any commitments to buy any, to any certain extent.

Q. Do you know why?

A. Well, due to some prices, inconsistency, or something pertaining to OPA regulations, where the poultry jobbers have been placed in a position where they are not able to buy the turkeys for civilian use.

Q. Are you acquainted with Mr. Norton?

A. Yes, sir.

Q. How long have you known him?

A. About eight years.

Q. Have you dealt with him in this business?

A. Through our meat dealers, yes.

Q. Does your association buy turkeys from him?

A. Not as a group, but individually the meat dealers do.

Q. Individually they do? A. Yes, sir.

Q. Now aren't there other sources from which your members could get turkeys?

A. I believe that most of the other jobbers that they have con- [242] tacted are in the same position as Mr. Norton and the only way that they could

(Testimony of Harold E. Carlson.)

buy turkeys would be to buy direct and they are not in a position to go out and deal with the poultry farmers direct.

Q. No; they are not in a position to go and haul their turkeys in? A. That is right.

Q. So the prospects for getting Thanksgiving turkeys here are not so good, are they?

A. That is right.

Q. How about Christmas?

A. The same condition prevails there.

Q. The same thing?

A. So far as I know.

Mr. Skulason: You may cross examine.

Mr. Wetherall: No cross examination.

Mr. Skulason: Thank you, Mr. Carlson. You may go, then.

(Witness excused.)

Mr. Skulason: Is Mr. Gassett here?

RAYMOND L. GASSETT

was thereupon produced as a witness in behalf of the plaintiff in Civil Action No. 2575 and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Skulason: [243]

Q. Your name is Ray Gassett, is it?

A. Yes, sir; Raymond L. Gassett.

Q. And where do you live?

(Testimony of Raymond L. Gassett.)

A. I live in Portland.

Q. You have lived here for some time?

A. For the past thirteen years.

Q. And your business, please, Mr. Gassett?

A. Sir?

Q. Your business?

A. I am connected with the Fred Meyer organization at the present time.

Q. In what capacity?

A. Well, I am handling public relations and buying different commodities.

Q. Do you have anything to do with buying meat?

A. No; not with Fred Meyer.

Q. Turkeys? A. No, sir.

Q. Do you know anything about the source from which Fred Meyer organization gets its turkeys?

A. Yes, I do.

Q. What is the source?

A. We depended for a good many years—that is, the company has, for about 60 per cent of its supplies, from Northwest Poultry. [244]

Q. Mr. Norton's corporation?

A. Mr. Norton's company.

Q. And do you know anything as to the situation, whether he can supply turkeys now or not?

A. Yes. I omitted to tell you that I am the OPA co-ordinator of Fred Meyer's, so I do know something about why we can't get turkeys.

Q. Now you tell the Court why you can't get them.

(Testimony of Raymond L. Gassett.)

A. Well, due to general orders put out by the District Office in San Francisco, changing our suppliers from processors, or from jobbers to processors and prohibiting them from dealing like they should with the farmer, paying the charge—charging the farmer more for processing turkeys than they should, why, we haven't been able to get the turkeys to supply us, and I understand he is also under embargo to the Government for a certain number of turkeys for the armed forces.

Q. Where does that leave us civilians for turkeys.

A. Well, it looks like we are not going to have any.

Q. We are not going to have any?

A. That is the way it looks like.

Q. This is, I believe, the 9th of November, Mr. Gassett.

A. Yes, sir.

Q. Isn't there still time to secure demands and have orders accepted for the Thanksgiving trade?

A. Oh, yes. [245]

Q. How much time would you have to have? What would you say would be the minimum?

A. Well, we should have at least five days before Thanksgiving, the very minimum, five or six days before Thanksgiving.

Q. To get your turkeys? A. That is right.

Q. And how about the Christmas trade?

A. Well, I would say about the same—five or ten days before Christmas.

(Testimony of Raymond L. Gasset.)

Q. Now when you say you are OPA co-ordinator, what does that mean exactly?

A. That means that I try to sell them our OPA problems, which are many and numerous.

Q. And do you regard this as an OPA problem? A. Sir?

Q. Do you regard this——

A. I do, yes, sir.

Q. ——as an OPA problem? A. Yes, sir.

Q. And your solution for it, then?

A. Well, the only solution that I could offer would be to do away with a couple of orders they have given out of the District Office down here and let the M.P.R. Regulation that those general orders down here in San Francisco supersede take its rightful place where it belongs. [246]

Q. Put those orders in their place where they belong, you say?

A. The General Maximum Regulation, or the Maximum Price Regulation for handling turkeys is all that we need out here.

Q. And ignore or do away with the regional orders from San Francisco?

A. That is right, the regional orders, I think G-3, and I forget the other one.

Q. G-93 and 9-3, eh? A. That is right.

Q. Related numbers? A. Yes, sir.

Q. That is your solution? A. Yes, sir.

Q. And that you think would be a good solution?

A. I do.

(Testimony of Raymond L. Gassett.)

Q. Do you feel that it is necessary to loosen up this turkey situation?

A. Well, if we want to supply the civilian trade and the people who are engaged in war activities in this territory. We have numerous customers come in each day asking us to allow them to place their orders for turkeys. We could take orders every day for fifty or a hundred in each market that we have for delivery for Thanksgiving, if we were sure we were going to get them. We don't think we are going to get any turkeys, so we are not taking any orders. [247]

Mr. Skulason: You may take the witness.

Mr. Wetherall: No cross examination.

Mr. Skulason: That is all, sir, and thank you for coming.

The Witness: Yes, sir.

(Witness excused.)

Mr. Skulason: Mr. O'Neil, please.

The Clerk: Will you state your name, please.

Mr. O'Neil: George H. O'Neil.

GEORGE H. O'NEIL

was thereupon produced as a witness in behalf of the plaintiff in Civil Action No. 2575 and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Skulason:

Q. Mr. O'Neil, you live in Portland?

A. Yes, sir.

Q. How long have you lived here?

A. I have lived here for about thirty-one years.

Q. What is your occupation, please?

A. I am a restaurant operator, with the Bohemian Restaurant.

Q. Is there any association of restaurant proprietors or operators here?

A. Yes. I happen to be at the present time President of the Restaurant Association in Portland.

Q. How many members does that have? [248]

A. Well, we have roughly 200 members, but about 125 are paying dues, paying members.

Q. Has that association existed for some time?

A. Yes, it has, for about the last twelve years.

Q. How long have you been proprietor of the Bohemian?

A. Since 1927 or '29, rather.

Q. Now does your association buy turkeys for the holiday trade?

A. I believe that, without exception, all of the members of the Association do, because they are all restaurant operators.

(Testimony of George H. O'Neil.)

Q. Yes. Has there been any difficulty about securing turkeys for the trade at this time?

A. Yes, there has been some difficulty.

Q. Will you explain to the Court, please.

A. Well, the difficulty that most of the restaurant operators have experienced up until now is that a lot of the operators have always insisted on getting the very best turkeys, the No. 1 family turkeys, and they haven't been able to do that, which was stopped because of the Government order that the Army should receive all the No. 1's and there hasn't been, at least to my knowledge, a sufficient amount of the other birds to let them get what they wanted, or the quality that they desired.

Q. Now have you investigated the situation at all to ascertain the reason for this condition?

A. The reason that they could not?

Q. Get turkeys?

A. Get turkeys? Well, as I said, that some of them didn't take the turkeys because they were not of the quality that they insist on, and the next answer would be that there was not sufficient amount to receive the turkeys.

Q. Is this a usual annual situation, or is it unique?

A. No, this is not a usual situation. This is a very unusual situation.

Q. Is there any agency of your Association for the buying of turkeys wholesale?

A. There isn't any particular agency but they do buy from different firms in town that handle the turkeys.

(Testimony of George H. O'Neil.)

Q. Do you know Mr. Norton here?

A. Yes, sir, I do.

Q. Known him for some time?

A. Yes, quite some time. I believe ever since he has been with the Northwest Poultry.

Q. Have you dealt with his corporation?

A. Yes, we have.

Q. Bought turkeys from them?

A. That has been our main commodity from there.

Q. Now if you can't get any turkeys from the Northwest Poultry this year, what are you going to do about turkeys for the holiday trade and Thanksgiving trade?

A. Well, I am afraid that most of the members of the Association will be inclined to be short, because if they don't get [250] them from Mr. Norton and from some of the other wholesale houses that they have been used to getting them from in town, they will not have enough for their Thanksgiving supply; at least, to begin with, first.

Q. And as to the Christmas business?

A. Well, as far as the Christmas business is concerned, the situation might have been relieved somewhat by the amount of turkeys that the Army had secured.

Q. But of course you have to get the turkeys from the same sources? A. Yes.

Q. For Christmas as for Thanksgiving?

A. I believe, without exception, that most of the

(Testimony of George H. O'Neil.)

places in town depend on the Northwest Poultry for their turkeys, because they have been able to supply them in whatever amounts they wished; and I would also like to say that between Thanksgiving and Christmas, that the restaurant operators who wish to secure the prime birds to put away in storage, to carry them through the rest of the year, they also try to get them at that time.

Q. Have you tried to obtain turkeys from Mr. Norton's corporation?

A. Yes, I have, and I have received turkeys.

Q. You have what?

A. I have received turkeys from him.

Q. You have received some turkeys from him?

[251]

A. Yes.

Q. Has he been able to supply you with what you need, or what you ordered?

A. Well, I think we, at the Bohemian Restaurant, come in the category of being one of the oldest customers they have there. They make it a practice to try and treat their oldest customers as well as they can, and while we haven't been able to secure all that we wanted just when we wanted them, we have been quite well taken care of. That is, on not No. 1 birds but the B birds, the next grade below.

Q. But there has been a difference in your ability to secure turkeys this season from the past seasons?

A. Yes. We haven't had the—well, we haven't been able to get them in any amount that we wish. We take what we can get.

(Testimony of George H. O'Neil.)

Mr. Skulason: You may take the witness.

Cross Examination

By Mr. Wetherall:

Q. Mr. O'Neil, I believe you said you had received some turkeys from Northwest Poultry. Have you, or did you receive turkeys from Northwest Poultry on and prior to November 5, 1944?

A. Yes.

Q. What grade turkeys were they?

A. B grade.

Q. B grade? A. Yes. [252]

Mr. Wetherall: That is all.

Mr. Skulason: That is all, Mr. O'Neil. Thank you.

(Witness excused.)

Mr. Skulason: Now Mr. Norton, you may take the stand again, please.

C. W. NORTON

thereupon resumed the stand as a witness in behalf of the plaintiff in Civil Action No. 2575 and further testified as follows:

Direct Examination

By Mr. Skulason:

Q. Will the Bailiff please hand the witness these two papers. What have you there, Mr. Norton?

A. The first one I have here is the release from Washington, D. C., to the District OPA Offices, per-

(Testimony of C. W. Norton.)

mitting us to act as an agent for the Government in the sale of turkeys to the Government.

Q. That is dated what date?

A. That is dated the 27th of September.

Q. And the other one?

A. The other is Amendment No. 1 to Order No. G-3 from San Francisco, from the OPA office of San Francisco.

Q. Defining who is a wholesaler?

A. That is correct. It is Amendment No. 1. [253]

Mr. Skulason: We offer them in evidence, your Honor.

The Court: Admitted.

(Teletype of September 27, 1943, from Richard Gerould, Division Counsel for Food, to "All Cities on Teletype Circuit", so offered and received, was marked Plaintiff's Exhibit 3, and "Amendment No. 1 to Order G-3 under Section 1429-14 (e) of Revised Maximum Price Regulation No. 267, as amended", so offered and received, was marked Plaintiff's Exhibit 4.)

(Testimony of C. W. Norton.)

PLAINTIFF'S EXHIBIT No. 3

Poultry, Eggs & Dairy Products

Price-Legal

AARubin/el

Teletype

To: All Cities on Teletype Circuit

Attention: All OPA Head Attorneys

All Regional Price Executives

In Teletype Broadcast 9/27/43, This Office Stated That Distributors Could Not Act As Selling Agents for Processors, Deliver the Turkeys to the Army at Premium Prices Established for Sales to the Government and Then Divide the Premium With the Processor. It Was Held That Such Action of Dividing Premiums Constituted Definite Violation of RMPR 269 Since Only the Government Was Permitted to Pay the Premium Price for Turkeys.

After Very Careful Consideration of All Aspects of the Problems Involved in This Ruling (Which Has Been Reexamined Because of Army Difficulties in Obtaining Its Poultry Requirements), It Has Been Decided to Modify the Interpretation to Some Extent. Accordingly, This Office Now Finds That a Division of Premiums for Sales to the Government Between the Agent-Distributor and the Principal-Processor Is a Violation of the Regulation Only Where the Total Amount Returned to the Principal Exceeds the Maximum Price Established by the Regulation for a Sale by the Principal to the Government. The Agency Fee or Charge May

(Testimony of C. W. Norton.)

Not, However, Exceed That Permitted by MPR 165. An Agent May Thus Sell Poultry to the Army for the Account of His Principal and Return to His Principal Any Amount Not in Excess of That at Which the Principal Himself Could Have Sold the Poultry to the Army. This in Effect Merely Results in the Principal Sharing Part of His Maximum Selling Price With Another Who Performs Certain Functions for Him, and No Sale at Over-Ceiling Prices Is Involved. Obviously, However, This Applies Only Where a Bona Fide Principal-Agent Relationship Has Clearly Been Established, and the Processor Cannot Sell the Poultry to the Distributor at a Premium or a Price in Excess of That Established for Such Sale Between the Types of Parties Involved, Even Though the Processor Could Have Sold the Poultry Directly to the Army at a Premium.

This Interpretation Applies Only Where the Principal Receives No More From His Agent Than He Could Have Obtained Had He Sold the Poultry Directly to the Government. It Does Not Permit Any Person to Share With or Return to Any Other Person Who Could Not Himself Have Sold Poultry Items at That Markup Any Part of Any Amount Which Includes a Markup Obtained for the Sale of Poultry. Any Such Sharing of a Distributive Markup or Margin With One Who Could Not Himself Have Added Such Markup or Margin to the Applicable Base Price Is a Violation of RMPR 269, and Will Be Specifically Spelled Out As a

(Testimony of C. W. Norton.)

Violation in the Next Revision of the Regulation. In Other Words a Seller May Not Obtain a Higher Price by Selling Through An Agent Than He Could If He Had Made the Sale Directly. This Prohibition Applies Whether or Not the Person Making the Sale Is An Agent of the Person to Whom All or Part of the Price Received for the Poultry Is to Be Returned. Nor Does This Interpretation Permit the Sharing or Splitting of Any Part of a Sale Price or Permitted Decrease in Other Instances.

RICHARD GEROULD

Division Counsel for Food

AARubin/el

10/2/44

PLAINTIFF'S EXHIBIT NO. 4

Office of Price Administration

San Francisco Regional Office

Region VIII

Amendment No. 1 to Order G-3 Under Section
1429.14 (e) of Revised Maximum Price Regu-
lation No. 269, As Amended

POULTRY

Definitions of Processing Plant and Wholesaler

For the reasons set forth in an opinion issued simultaneously herewith, and under the authority vested in the Regional Administrator of the Office

(Testimony of C. W. Norton.)

of Price Administration by Section 1429.14 (e) of Revised Maximum Price Regulation No. 269, and the authority reserved in paragraph (c) of Order G-3 issued under Section 1429.14 (e) of Revised Maximum Price Regulation No. 269, and with the approval in writing of the Price Executive of the Poultry, Eggs and Dairy Branch of the Food Division of the Office of Price Administration, and the Division Counsel for Food of the Office of Price Administration, said Order G-3 is hereby amended in the following respects:

- (a) The two undesignated sentences of paragraph (b) are amended to read as follows:

The definition of "wholesaler" set forth in Section 1429.21 (b) (5) of Revised Maximum Price Regulation No. 269, as amended, shall be modified as follows: "Wholesaler" means any person other than a "processing plant" who possesses all of the following characteristics:

- (b) Paragraph (b) (ii) is amended to read as follows:

He must maintain at the particular place where he is located, a business establishment where he receives and stocks poultry items, and where he employs a personnel which physically handles and distributes 75% or more of his dollar volume of such poultry items to individual retail stores or institutional, industrial or commercial users, Naval or Military estab-

(Testimony of C. W. Norton.)

lishments, or the War Shipping Administration.

This amendment shall become effective October 15, 1944.

(56 Stat. 23, 765; 57 Stat. 566; Pub. Law 383, 78th Cong.; E. O. 9250, 7 F. R. 7871; E. O. 9328, 8 F. R. 4681).

Issued this 11th day of October, 1944.

/s/ GEORGE MONCHARSH

Acting Regional Administrator

Office of Price Administration
San Francisco Regional Office
Region VIII

Opinion Accompanying Amendment No. 1 to Order G-3 Under Revised Maximum Price Regulation No. 269, as Amended.

POULTRY

Definitions of Processing Plant and Wholesaler

The accompanying amendment to Order G-3, issued under Section 1429.14(e) of Revised Maximum Price Regulation No. 269, amends the modified definition of "wholesaler" as set forth in paragraph (b) of Order G-3. The purpose of the amendment is more clearly to define the functions of wholesalers.

The present wording of paragraph (b) of Order G-3 does not clearly state that a "wholesaler" is a person other than a "processing plant". Neither

(Testimony of C. W. Norton.)

does the wording of sub-paragraph (b)(ii) state to what extent sales of poultry items must be made to individual retail stores, or institutional, industrial, commercial users, Naval or Military establishments, or the War Shipping Administration. This resulted in circumvention of the intended effect of Order G-3.

Therefore the definition of "wholesaler" set forth in Order G-3 is amended by specifically providing that a "wholesaler" means any person other than a "processing plant". The order also amends sub-paragraph (b)(ii) by requiring that a "wholesaler" must maintain at the particular place where he is located, a business establishment where he receives and stocks poultry items and where he employs a personnel which physically handles and distributes 75% or more of his dollar volume of such poultry items to individual retail stores, institutional, industrial, or commercial users, Naval or Military establishments, or the War Shipping Administration.

The accompanying amendment will allow "wholesalers" to perform their normal distributive functions and will aid in the enforcement of the regulation. It will not increase the maximum price at which poultry items may be sold at retail, or to ultimate consumers, including commercial, industrial, institutional or government users. Neither will it have the effect of decreasing the margin of profit for retail sales of poultry items nor create or tend to create a poultry shortage or need for in-

(Testimony of C. W. Norton.)

crease in poultry prices in another locality. Therefore, the order is consistent with the provisions of Executive Order 9328, and will effectuate the purposes of the Emergency Price Control Act of 1942, as amended.

Issued this 11th day of October, 1944.

/s/ GEORGE MONCHARSH

Acting Regional Administrator

Q. Just one question or so, Mr. Norton, about this turkey situation. You have testified somewhat about it, as to the source from which the trade can obtain turkeys for civilian consumption. At this time what can you say?

A. Well, I see no way in which the civilian trade can even hope to get any turkeys as long as these two orders stand, and particularly while we are acting as agent for the Government, and by acting as an agent for the Government we are permitted to pay the growers a cent a pound more for turkeys than we would buying for civilians, and the Government, before they were released—before the order, War Food Order 106 was released, all of the wholesalers that were in possession—that were dressing turkeys for the Government, had to commit [254] themselves for a definite amount of turkeys covering the next four months. In our case we are committed to the end of February for 6,000,000 pounds of turkeys. Now then, War Food wanted to get the order released so the civilians could get turkeys and under

(Testimony of C. W. Norton.)

the conditions we are operating under here, where we are able to pay the grower a cent a pound more, if the OPA classes us as a processor and not a wholesaler certainly we could not wholesale turkeys. Consequently we would have to give them all to the Government. We are allowed a markup in selling to the Government. Everyone is. Processor and wholesaler alike is allowed a markup in selling to the Government. That markup is a cent a pound in selling to the Government. I see no way in the world in which civilians can ever pay to get any turkeys, unless they secure them in the normal channels through wholesaler dealers in Portland or the Portland territory.

Q. Mr. Norton, how critical or imminent is this? What time would you have to have to get ready to fill an order for the Thanksgiving trade?

A. The most serious part of it, as I see it, I was in Seattle last week and the meat markets up there were all advertising turkeys and were taking orders for turkeys. They were securing them through the cooperative up there at Seattle. One of the big organizations up there agreeing to furnish them, was the Washington Cooperative Association, advertising turkeys and [255] taking orders. And that is the customary practice of the trade down here. If the meat market will come in and inquire about turkeys, and we commit ourselves, they in turn go out and take orders from the housewife. If she wants a 15-pound turkey they take her order for delivery on such and such a date. The serious part of it now

(Testimony of C. W. Norton.)

is, they are not able to take any orders and it is going to be down here in a few days, until they will just be going out in the country, buying on the black market in order to get a few live turkeys. A lady called me last week and wanted to know if 52 cents a pound was according to the live ceiling. She bought one out in the country in order to have a live turkey for 52 cents.

Q. Would there still be time if these orders were set aside and held inoperative, to supply the holiday trade? A. By Monday?

Q. By next Monday?

A. By next Monday.

Q. That would be the dead line, so far as you are concerned?

A. I believe it would—Monday or Tuesday. The difficulty is, we dress in our plants at the present time approximately a quarter of a million pounds. The civilians want hen turkeys. They want certain sizes. It takes a lot of turkeys to supply the people, approximately 600,000 in this trade territory. They all want one turkey.

Mr. Skulason: You may take the witness. [256]

Mr. Wetherall: No cross examination.

Mr. Skulason: That is all, Mr. Norton.

(Witness excused.)

Mr. Skulason: That is our case, your Honor.

The Court: Have you got any testimony?

Mr. Wetherall: Your Honor, we want to make the record clear at this time, that we object to the

testimony of all of the witnesses called by the plaintiff, and we move to strike all of their testimony, on the grounds previously indicated, and likewise the documentary evidence which has been introduced in the case, and at this time we renew our motion to dismiss the complaint, upon the grounds stated in our written motion.

The Court: I will overrule it at this time. Now go ahead. You will have to explain this to me, Mr. Skulason.

Mr. Skulason: I beg your pardon?

The Court: You will have to explain this to me.

Mr. Skulason: Well, the turkey situation?

The Court: Well, you will have to tell me about G-3 and G-93, and this G part of it.

Mr. Skulason: All right, your Honor: I confess that when Mr. Norton brought this to me I didn't know anything about processing turkeys, or killing or hauling them, or wrapping them, boxing them, or anything else, and he has had to educate me to the best of his ability until I know a little about it, [257] and starting here then with G-93, this G-93 was issued on the 2nd day of May, 1944, from the Regional Office in San Francisco and it is entitled "Custom Dressing of Turkeys", and then it says that, "For the reason set forth in an opinion issued simultaneously" with this order number section so and so, "it is hereby ordered." This is the beginning of this.

"(a) The adjusted maximum price for the service of custom processing of live turkeys in Region 8 shall be as follows:

"Type of Service	Hens	Toms
"Kill and haul	\$.30 per head	\$.35 per head
"Loose	.035 per lb.	.03 per lb.
"Boxed	.045 per lb.	.04 per lb

"(b) Definitions:" And the first definition is, "the service of custom processing of turkeys 'boxed' means the service of assembling, killing, bleeding, plucking, chilling, grading, head-wrapping, and boxing.

"(2) The service of custom processing of turkeys 'loose' shall be as defined in (1) above except boxing."

So these turkeys that we are processing loose and are required to process under this order at so much per pound instead of so much per head, this processing is the assembling, the killing, the bleeding and plucking and chilling and grading and head-wrapping.

Now Region 8 means the States of California, Washington, [258] Nevada, Oregon, except Malheur County, and Arizona, except those portions of Coconino County and Mojave County lying north of the Colorado River, and so forth, and certain counties in Idaho.

This was the first order——

The Court: That gentlemen has remained in attendance. Maybe he would like to come in where he was a witness this morning. Would you like to come in so you can hear better?

(The gentlemen referred to here came within the railings.)

The Court: Put him right over there, Bailiff.

Mr. Skulason: Accompanying this Order G-93 there was issued, from the office here in Portland, an order on May 8th, effective date May 8th. This we have identified as Exhibit B, and this Exhibit B repeats the ceilings as to processing—calls them ceilings. It repeats the definitions, and then it modifies the definition as to Region 8 and says that Region 8 means States of Washington and Oregon except Malheur County, and then interpretations, and Interpretation No. 2 I think is the one we are chiefly interested in.

Oh, yes. I will give this first and then revert to that.

Now the above prices on a pound basis, and still on a kill-and-haul basis, as things stood then, are the only prices which may be charged for processing services. Any [259] charge of less than the prices fixed in this order will be considered an attempt to evade or revise the Maximum Price Regulation 569, which has reference to agricultural products.

“Charges for more than these prices would be an outright violation of this order.”

In other words, as we understand this here, there is not a Maximum Price Regulation for the service but an absolutely inflexible charge to be made, no more and no less, and we make the point, your Honor, that under the Emergency Price Control Act such a regulation must be invalid because that deals only with the maximum prices. If this had been only a maximum price regulation we could

have gone ahead. We could have charged the less and we could have obtained the birds from the growers. But now we must charge them this, and as your Honor will remember the testimony, that raises the expense to the grower up to 72 cents on ordinary 15-pound birds per head, from 30 or 35 cents, and up as high as \$1.05 per head, according to Mr. Perry from Seattle, upon heavy birds, and we can claim the practical result of that is that we can't get the birds.

Now then, if we had any latitude under these orders of dividing with the grower some of this expense, rebating to him some of it, it might work. That is what the cooperatives are allowed to do—have been allowed to do.

Now before I leave this order and definition here, [260] “The service of custom processing of turkeys” is the same as here, as in the other G-93.

Then it says: “(3) The service of custom processing of turkeys ‘kill and haul’ means assembling, killing, bleeding and plucking”, and then in parentheses, “This charge should be applied by dealers who do not have the proper facilities for chilling, grading, head-wrapping and boxing.” Of course Mr. Norton has all of these facilities, and all of these people dealing in this business have coolers.

Now then, that was the situation when this suit was commenced and we attack those two orders, your Honor, in this suit.

Then there comes still another order, known as G-3, issued on August 30th, 1944, which we also attack, and which, with certain amendments to it,

has been the subject of examination and scrutiny here by the last few witnesses—with those witnesses and with Mr. Norton.

Now this G-3, which we will say is all wrong, purports to define a processing plant, and a “Processing plant means any business establishment which purchases or receives live poultry items and which converts the larger part of dollar volume of all poultry items handled, from live into dressed, drawn, or quick frozen eviscerated poultry.”

“ ‘Processing plant’ does not mean any person who does 75 per cent or more of his dollar volume in the distribution as a [261] ‘wholesaler’ of poultry items converted from live to dressed,” and so forth, “and who in the course of such distribution as a ‘wholesaler’, incidentally converts live birds into dressed, drawn,” etc.

Then the definition of a wholesaler set forth in Section so and so, “shall be modified as follows:

“A wholesaler means any person who possesses all of the following characteristics:

“(i) He must customarily receive, or purchase and receive poultry items in wholesale quantities.

“(ii) He must maintain at the particular place where he is located, a business establishment where he receives and stocks poultry items, and where he employs a personnel which physically handles and distributes such poultry items to individual retail stores and institutional concerns.

“(iii) He must customarily sell or distribute poultry items in quantity lots which are smaller than his purchases or receipts.

“(iv) He must customarily sell or distribute at least 75 per cent of his dollar volume of poultry items, exclusive of sales to the United States Government, or any agency thereof, for ultimate consumption within a radius of 100 miles from his place of business.”

Then that applies to Arizona, Nevada—a part of Washington it does not apply to—and Utah. [262]

Now these are the three orders that we have attacked, and then there came out another one.

The Court: Is G-3 a regional order?

Mr. Skulason: Yes, your Honor. G-3 is a regional order; so is G-93, and what we have called Exhibit D that came out on May 4th was issued from the office here, as I understand it. Then came another regional order from San Francisco, and that is Amendment No. 1 to G-93, and that——

The Court: The date?

Mr. Skulason: The date of that is September 19th, 1944, and that provided that the maximum price for the service of custom dressing live turkeys into dressed turkeys in Region 8 shall be as follows:

For the service of kill and haul 2.8 cents per pound.

There they abandoned the per-head service charge and put the kill and haul on the common basis, the same as the dressing and processing of loose and boxed turkeys.

For the service of kill and haul, 47.1 per cent of the hot weight when computed on a hot-weight basis.

For the service of dressing turkeys in boxed form 3.8 cents per pound.

And then there are definitions about the same as before, and the region is again defined.

“This order shall not apply to any processor of turkeys who dresses turkeys for individuals for their own [263] consumption and not for resale.”

Then that being the situation, and the complaints being many and loud and long, the office in Washington attempted to relieve the situation and find a way out. Mr. Norton and his corporation could not function on this basis at all, for the reasons I have adverted to, the expense to the grower, so there came from Washington—not from San Francisco—a teletype to All Cities on Teletype Circuit, All OPA Head Attorneys, All Regional Price Executives, dated October 2nd, 1944. They referred to a teletype broadcast of September 27th, 1943. Now this says: “After very careful consideration of all aspects of the problems involved in this ruling”—which they dated as of September 27th, '43—maybe I had better read the first part of it.

“In Teletype Broadcast 9/27/43, this Office stated that distributors could not act as selling agents for processors, deliver the turkeys to the Army at premium prices established for sales to the Government and then divide the premium with the processor. It was held that such action of dividing premiums constituted definite violation of RMPR 269 since only the Government was permitted to pay the premium price for turkeys.

“After very careful consideration of all aspects of the problems involved in this ruling (which has been re-examined because of Army difficulties in

obtaining its poultry [264] requirements), it has been decided to modify the interpretation to some extent. Accordingly, this office now finds that a division of premiums for sales to the Government between the agent-distributor and the principal-processor is a violation of the regulation only where the total amount returned to the principal exceeds the maximum price established by the regulation for a sale by the principal to the Government. The agency fee or charge may not, however, exceed that permitted by MPR 165. An agent may thus sell poultry to the Army for the account of his principal and return to his principal any amount not in excess of that at which the principal himself could have sold the poultry to the Army. This in effect merely results in the principal sharing part of his maximum selling price with another who performs certain functions for him, and no sale at over-ceiling prices is involved."

Now that we understood to mean that the Northwest Poultry, the plaintiff here, could enter into agency contracts with the growers of turkeys and, as has appeared in evidence, I believe, we prepared a very brief agency contract, which I will say to your Honor I submitted to the OPA attorney over the telephone and he had no objection to it, and I think I submitted it again. Anyhow, it was accepted, and the result has been, the practical result has been that Mr. Norton has entered into agency contracts to act as agent for the growers of turkeys and has been able to hold his business because of [265] that, because he is now allowed to

rebate or return to the grower a portion of the processing charge under these former orders. So now, as far as these orders as thus modified from the main office are concerned, the plaintiff is able to carry on, but there still remains this Amendment No. 1 to G-3, issued October 11, 1944—that is the Plaintiff's Exhibit 4 here—which defines, or re-defines a wholesaler, and it says, "A wholesaler means any person other than a processing plant which possesses all of the following characteristics." Well, that puts us out in the cold right away, because we have a processing plant. That is the main part of our business. So we are entirely precluded from acting as wholesaler, and your Honor has heard the testimony here of what that results in. It cuts off a very large part of the plaintiff's business and results in this inconvenience of the community at large that your Honor has heard about.

So now we are asking the Court, on the grounds stated in our complaint, to find and rule that these orders are all invalid; that G-93 and G-3 are invalid, even as amended, and we want them held invalid because of what we know is in preparation here against the plaintiff in this case. There is being prepared in this field a case against Mr. Norton and his corporation for some kind of penalty. We could have called in here enough people to fill half of this courtroom, I think, who have been contacted by these people in the field [266] for the purpose of obtaining evidence of violations of G-93 and G-3, and we think that we are entitled to have them held

inviolable and thus save the Northwest from the consequences which are certainly in preparation and in the offing.

That is what I have to say now about G-93 and G-3 as modified and as amended, except this matter of wholesaler. Whatever the Court may do about this other order we feel very strongly that the Court should at least hold invalid this one which deprives the plaintiff of being a wholesaler, as being entirely unwarranted and unreasonable; and throughout this whole case, your Honor, of course there runs the undisputed fact that a certain kind of business practice, certain methods have been followed in this locality for years, and years, and years here, and the statute, of course, your Honor knows, says the business practice shall not be disturbed.

Now of course this whole thing is predicated on the Act of Congress adopted in 1942, known as the Emergency Price Control Act, and if the Court will bear with me I will read the portion of that preamble to show what that Act really is and why it was adopted.

"It is hereby declared to be in the interest of the national defense and security, and necessary to the effective prosecution of the present war, and the purposes of this Act are to stabilize prices and to prevent speculative, unwarranted and abnormal increases in prices and rents, to eliminate and [267] prevent profiteering, hoarding," and so forth. And we propose to provide price schedules, and those schedules are all maximum price schedules. I don't

think it needs any argument to satisfy anyone as to the intent and purpose of this Act. It was to put a ceiling on things, to establish a maximum price beyond which it would be unlawful to go.

Now I have read this Act, and counsel here, my associate has read it, and so have others, and I can't find anything of this Act that in any way authorizes such an order as G-93 fixing, not a maximum but a fixed absolute price. "This you must charge the grower or take the consequences, no more and no less." So on that point, on the theory that there be no authority for the issuance of such a regulation, we refer to the Act itself. Then this other point, as I say, that runs through the case, "The powers granted in this section", that is about regulations.

"First, no power conferred by this section shall be construed to authorize any action contrary to the provisions and purposes of Section 3.26."

And then, "The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods or means or aids to distribution established in any industry, or changes in established rental practices except where such action is affirmatively found by the Administrator to be necessary to [268] prevent circumvention and evasion of any rental regulation, order, price schedule or requirement under this Act."

So, your Honor, that is the case, and I hope I have been able to make myself understood so far as I understand it.

The Court: What is the advice that your client is acting under now?

Mr. Skulason: He is now acting under that teletype. He is now acting under the agency arrangement.

The Court: Why doesn't he continue to act under it?

Mr. Skulason: So far as processing turkeys is concerned. But now the grower come in to him.

The Court: What is the advice that you said you gave him?

Mr. Skulason: Oh, yes. That came from this matter, your Honor, of what he should do when he was informed that he must not act as wholesaler and was told that if he did attempt to act as a wholesaler that he would be punished, and fined, and so on and so forth; and they used the word criminally" then.

The Court: How did he sell to the Army and the Navy?

Mr. Skulason: Under the agency. This was under the agency agreement to the grower. It covers—this letter read here was designed—and there are two pages of it, your Honor—to facilitate the selling of turkeys to the Government.

The Court: You sent me a copy. I have it here.

Mr. Skulason: You have it there?

The Court: Yes.

Mr. Skulason: And so he can operate now. Suppose he had no other business at all with anybody except the Government.

The Court: How is his problem with civilians' supplies different than his problem with the armed forces?

Mr. Skulason: Civilian business? He hasn't any civilian business. He is cut off from it. This teletype relates only to supplying the Army.

The Court: Yes. We understand that. In other words, if the teletype was not limited to the supplies to the Army it would be all right?

Mr. Skulason: It is limited.

The Court: If it were not limited to supplies to the Army it would be all right, wouldn't it?

Mr. Skulason: Yes; I think it would. I think it would.

The Court: Since he got the teletype has he attempted to get an extension of it to cover the civilian problem?

Mr. Skulason: Well, shall we have him answer that, your Honor? I don't know just what he has done.

The Court: You can answer it and back it up with testimony later.

Mr. Skulason: Yes. Will you pardon me a moment?

The Court: Yes.

(Mr. Skulason here conferred with Mr. Norton.)

Mr. Skulason: We have tried that, your Honor. I didn't think at the time when I had him on the stand that it was [270] relevant, perhaps, but I will put this in evidence a little later. On the theory

it may go in I will just read this, since your Honor asked about it.

This is dated October 30th, in Washington, and it is signed by K. W. Kerkey, Chief O.F.C. District:

“At request of T. G. Stitts, Government Chairman, you are personally invited to attend a two-day”—it is addressed to Mr. Norton—“to attend a two-day meeting of the poultry industry Advisory Committee beginning November 10 at ten A.M. in Room 3106 South Agriculture Building, Washington, D.C., to discuss ways and means of bringing about a better procurement rate of poultry for armed forces. Attendance limited to members only. Please advise whether or not you will attend.”

The Court: My question was, has he made an effort to extend the agency arrangement to civilian transactions?

Mr. Skulason: Yes, as a wholesaler. You will recall that he testified that he contacted one of the officials here, one of the local officials.

The Court: Has he made an attempt at the same source that gave him this teletype? You mean in Washington?

Mr. Skulason: Yes.

The Court: The same source in Washington?

Mr. Skulason: Yes. He has another wire dated November 6th—that is getting close to modern times—addressed to [271] Marshall R. Diggs, his attorney in the Colorado Building, Washington, D.C.:

“Please advise if any provision made for sales of turkeys to civilian trade on an agency agree-

ment the same as on sales to the Government. Also advise if we correct in continuing to act as the growers' agent on our Government sales now that the embargo is lifted." It was lifted on the 5th, was it?

Mr. Norton: The end of the 5th.

Mr. Skulason: "Stop. The date of our case against Chester Bowles will be set today as the judge advised he is taking jurisdiction." Well, maybe I assumed too much there. "The civilians in Oregon and Washington will not have any turkeys for Thanksgiving unless G-93 and G-3 are canceled and doubt if can get Court decision in time for Thanksgiving. Personal regards. C. W. Norton, President, Northwest Poultry and Dairy Products Co."

Mr. Norton: If he wants to know, I got one today.

Mr. Skulason: All right. I am assuming these will go in evidence. That is the reason I am reading them now. I intend to call Mr. Norton to have him testify to his efforts to get away from this non-wholesaler civilian business. I guess you had better take the stand.

C. W. NORTON

was thereupon recalled as a witness in behalf of the plaintiff in Civil Action No. 2575, and, [272] having been previously sworn, further testified as follows:

Direct Examination

By Mr. Skulason:

Q. Mr. Norton, have you been making some efforts to get relief as regards your capacity as a wholesaler in connection with the civilian consumption of turkeys?

A. At the meeting in Chicago, in the early part of September, when Ernest Eisenberg, the Chief Attorney for the OPA, and Waldo Haldeman, the Chief of the Dairy and Poultry Branch of the OPA in Washington, were there. They had three different meetings. One of the meetings was pertaining to the agency meeting with the growers—for the growers in sales to the Government. We also at that time were considering, or had been considering being permitted to pay a dividend to the growers the same as the Cooperative Association that has been carried on from that date until now. I talked to Washington at noon, during recess, to our attorney in Washington and——

Q. Let me show you this, first. What is that, Mr. Norton?

A. That is a wire that I had sent back to Mr. Kerkey, Chief of the Office of Distribution, War Food Administration, Washington, D.C.

Q. He is in charge, you say, of what?

(Testimony of C. W. Norton.)

A. He is the Chief of the Office of Distribution, War Food Administration, Washington, D.C.

Q. What is the date of that wire? [273]

A. October 31st.

Q. Read it.

A. "Impossible to attend Washington meeting at this season of year. Stop. The San Francisco Regional OPA Office issued two orders that has made it practically impossible to secure turkeys for the armed forces. They are Regional Order G-93 and G-3. Miss Alice Deppers has full particulars. If wish any information from this territory please advise. Regards."

Q. Was that in response to this?

A. The wire asking me to come to Washington.

Q. Yes. Then have you sent any further wires?

A. Excepting to our attorney, Marshal Diggs.

Mr. Skulason: Here is one from Marshall R. Diggs. May I offer that in evidence, your Honor.

The Court: It is admitted.

(The telegram dated October 31, 1944, C. W. Norton, President, to K. W. Kerkey, Chief Office of District WFA, Washington, D.C., so offered and received, was marked Plaintiff's Exhibit 5.)

(Testimony of C. W. Norton.)

PLAINTIFF'S EXHIBIT No. 5

(Western Union Telegram)

NW2 L G Oct 31 1944 K W Kearkey Chief Office
of Dist WFA Washington D C

Impossible to Attend Washington Meeting at This
Season of Year Stop The San Francisco Regional
OPA Office Issued Two Orders That Has Made It
Practically Impossible to Secure Turkeys for the
Armed Forces They are Regional Order G-93 and
G-3 Miss Alice Peppers Has Full Particulars If
Wish Any Information From This Territory
Please Advise Regards

C W NORTON,

President Northwest Poultry
and Dairy Products Co.

OK RNW2 WUAG.. Thank U.. (930 AM).

The Witness: In talking with the attorney at
noon today——

Mr. Skulason: Let's identify that first. What
is that?

A. That is our wire to Marshall R. Diggs, Colo-
rado Building, Washington, D.C.

Q. Read that for us, please. [274]

A. However, the one I just read was from me
to Mr. Kerkey.

“Please advise if any provision made for sales
of turkeys to civilian trade on an agency agree-
ment the same as on sales to the Government.

(Testimony of C. W. Norton.)

Also advise if we correct in continuing to act as the growers' agent on our Government sales now that the embargo is lifted. Stop. The date of our case against Chester Bowles will be set today as the judge advised he is taking jurisdiction. The civilians in Oregon and Washington will not have any turkeys for Thanksgiving unless G-93 and G-3 are canceled and doubt if can get Court decision in time for Thanksgiving. Personal regards."

Mr. Skulason: I offer that in evidence.

The Court: It is admitted.

(The telegram dated November 6, 1944, C. W. Norton, President, to Marshall R. Diggs, Colorado Building, Washington, D.C., so offered and received, was marked Plaintiff's Exhibit 6.)

PLAINTIFF'S EXHIBIT No. 6

(Western Union Telegram)

NWI L G Nov 6 1944 Marshall R Diggs Colorado
Bldg Washington D C

Please Advise If Any Provision Made For Sales Of Turkeys To Civilian Trade On An Agency Agreement The Same As On Sales To The Government Also Advise If We Correct In Continuing To Act As The Growers Agent On Our Government Sales Now That The Embargo Is Lifted Stop The Date Of Our Case Against Chester Bowles Will Be Set Today As The Judge Advised He Is Taking Jurisdiction The Civilians In Oregon And Washington Will Not Have Any Turkeys For Thanks-

(Testimony of C. W. Norton.)

giving Unless G-93 And G-3 Are Cancelled And
Doubt If Can Get Court Decision In Time For
Thanksgiving Personal Regards

C W NORTON,

President Northwest Poultry
And Dairy Products Co..

RNW1 WUAG.. Thank U.. (1004AM).T

Mr. Skulason: Show him this, please.

A. This one here is from K. W. Kerkey, Chief
Office of Distribution, War Food Administration.

Q. What is the date?

A. That is dated October 30th.

Q. Will you read that?

A. "At request of T. G. Stitts, Government
Chairman, you are [275] personally invited to at-
tend a two-day meeting of the Poultry Industry
Advisory Committee beginning November 10 at
ten A.M. in Room 3106, South Agriculture Build-
ing, Washington, D.C., to discuss ways and means
of bringing about a better procurement rate of
poultry for armed forces. **Attendance limited to**
members only. Please advise whether or not you
will attend."

Mr. Skulason: I offer that in evidence.

The Court: It is admitted.

(The telegram dated Washington, D.C., Oc-
tober 30, 1944, K. W. Kerkey, Chief, etc., to
C. W. Norton, Northwest Poultry and Dairy
Products Co., so offered and received, was
marked Plaintiff's Exhibit 7.)

(Testimony of C. W. Norton.)

PLAINTIFF'S EXHIBIT No. 7

(Western Union Telegram)

WU AD202 68/67 Govt—WUX Washington DC
Oct 30 434P 1944 Rapid C W Norton Northwest
Poultry And Dairy Products Co—232 Oak St
Southeast

—At Request Of T G Stitts Government Chairman
You Are Personally Invited To Attend A Two-
Day Meeting Of The Poultry Industry Advisory
Committee Beginning November 10 At 10 AM In
Room 3106 South Agriculture Building Washing-
ton DC To Discuss Ways And Means Of Bringing
About A Better Procurement Rate Of Poultry For
Armed Forces Attendance Limited To Members
Only Please Advise Whether Or Not You Will
Attend—

K W KERKEY,

Chief OFC Dist.

T G STITTS,

10 10AM 3106 DC. 152P..

Mr. Skulason: You answered that with the
other wire offered in evidence?

A. Yes, I did.

Q. And said you could not attend?

A. Could not attend.

Q. Now have you made any other efforts? Is
there anything else as to this item that you can
notify us on, Mr. Norton?

(Testimony of C. W. Norton.)

A. We have been working on this order since May 8th, practically entirely between Washington, D.C., and here. We started in with the office at San Francisco and there was absolutely no chance of getting any adjustment from there, so we started in at the other end of the line, at Washington, D.C.
[276]

Q. Have you told us now all that you have in mind concerning this?

The Court: He made a remark when he was on the stand before, that he thought the thing could be considered together. What do you mean by that—interpreted together?

Mr. Skulason: Of what, if Your Honor please?

The Court: When he was on the stand before he made some remark about orders being considered together, read together, interpreted together.

The Witness: That was in regards to G-93 and G-3. We were called to the—I believe this is what you have reference to—we were called to the OPA office, all the wholesalers, and at that time we were presented with this Order G-93, or G-3, and were given to understand that those two orders were considered as one; that if we were forced to abide by G-3, certainly we would be forced to abide by G-93; that if they took a cent and a half away from us on one hand we would have to take it away from the growers on the other hand, which would be, in effect, putting the two orders together.

Q. Where was this meeting held?

A. At the OPA office in the Bedell Building.

(Testimony of C. W. Norton.)

Q. In Portland? A. In Portland.

Q. Who were present, representing the OPA?

A. Miss Cooper was there, and Mr. McCargar, and I believe all [277] the dealers in the City of Portland and some growers.

Q. Who called that meeting?

A. The OPA.

Q. And that was the result—you were informed they would be considered together?

A. That is right.

Q. And enforced together?

A. That is right.

Q. Then is there any other point?

The Court: What application does that have to what we are discussing?

Mr. Skulason: You mean what practical application?

The Court: Yes.

Mr. Skulason: Q. Now what is the practical effect of that on your business, Mr. Norton?

A. The practical effect, your Honor, is that if the OPA, under G-93, says that we should charge the growers so much for the processing of turkeys, and that is all we are to get, they take away the wholesaler's markup, so that we have to abide by the G-93 order in order to break even at all. The way it is now being allowed, to act as a wholesaler, we are permitted a one-and-a-half-cent markup on sales to restaurants, meat markets, steamships, and so forth. If that one-and-a-half-cent markup is taken away from us, then we would have to take it

(Testimony of C. W. Norton.)

away from the growers, which would, in effect, mean that we [278] would have to abide by G-93, which is taking more away from the growers than should be taken.

Q. Who takes the least, then?

A. The growers take the least. It does not affect the selling business of turkeys to the Government, or the consuming public one-hundredth of one per cent. I believe, in answering this other question, I started to say that I talked to the attorney in Washington today, and at this meeting tomorrow they will try and work out some solution which will have the effect of letting us act as an agent for the civilian trade, but there is nothing sure about it and I doubt very much if anything can come out of that in time for Thanksgiving. I am sorry I wasn't able to attend.

The Court: Any questions? That is all.

(Witness excused.)

Mr. Wetherall: We move to strike all the testimony of the witness and all the documentary evidence identified by the witness, on the grounds and for the reasons previously stated in similar motions.

The Court: I don't know that there is any need for me continually working on these motions. I understand you are protecting the record. Well, the only solution I have is, I don't think I am any more confused about this than everybody is who has anything to do with it, OPA included. Now

do you make any [279] claim of taking these regulations en masse? There is a construction of them that can be claimed, taking them all together, different from the one that is being impressed on them.

Mr. Skulason: I don't think so, your Honor. We can't see any other possible construction than what I have been trying to explain to your Honor, and there is no attempt made apparently to relieve the situation. You understand now what the civilian supply situation is here, and I don't see any remedy for it, except the annulment of the orders.

Mr. Wetherall: Your Honor, I might say that by acquiescing in counsel's argument we are by no means agreeing with what he has said.

The Court: You don't make me feel very good by saying that, to have me sit here and have me be deprived, at two or three successive hearings, of having the benefit of your discussions and the emphasis of your position, just for the purpose of making your record. That does not make me feel very good at all. You could just as well, so far as trying the OPA stuff that has been given to me in this case, you had just as well not be here. You stated on the record you wanted to dismiss, and you wanted your position made clear. You stated your position as to that and that is perfectly plain. Then you withdrew from the case altogether because you didn't want to, I take it, prejudice your position as to that. That is all perfectly plain. Of course you don't [280] acquiesce in it, and your position is that I have no right to act at all, and

maybe you are right. I haven't said yet that I have. But in a technical, involved, complicated, inconsistent matter like this, when San Francisco, Portland and Washington are acting, and are after a community of 500,000 people, I certainly feel that if counsel do participate in a hearing I am entitled to the benefit of an explanation of the position of the Government agencies. I haven't had it at all, and I don't think it would prejudice your basic claim that I have no jurisdiction to act. I am up to it now, that I have to take all of this matter and I have got the position of the other side but their position is a personal position. I have to take all of this matter now and take it off by myself and see if I can figure out what the Government was trying to do in saying that a man who has always been a wholesaler and been deemed in the world of business affairs as a wholesaler, is not now a wholesaler, and I would have welcomed—it is too late in the case now to be of any help—I would have welcomed some explanation of how anybody approaches a practical problem like this, of changing the category of people in the business world and what justification there is for doing that, other than somebody's fight—just somebody's idea that is a good thing to do.

So the record is perfectly clear. Your position on that side of the table is that I have no jurisdiction whatever [281] to act. Maybe I haven't, but there are lots of cases where jurisdictional objections are entertained, but, nevertheless, we feel that

we have to give the merits, in whole or in part, before we are prepared to feel confident to pass on the jurisdictional question. That is not an unusual situation.

Mr. Wetherall: I might add, your Honor, that of course the validity, it occurs to me, inevitably would draw us into complex questions of law and fact, and our participation in that issue would have required the calling of numerous witnesses on our part to discuss the economic background of these orders and explain how they relate to the trade—in a word, to explain just how the orders operate, and why they were issued in their present form. That would have been necessary in order to present a complete and fair case to the Court, and it seems to me that the trial here, if I may say so, demonstrates the wisdom of Congress in indicating Section 204 (d) and thereby channeling into a special court, namely, the Emergency Court of Appeals, the exclusive jurisdiction to try questions of this nature. Such questions of course are difficult questions to handle, and it seems to me that that is further argument in support of our position on that point.

The Court: In the early stage of OPA a perfect turmoil existed in this community about the scrap iron situation. Nobody here claimed to understand the regulations that had been put out, and certainly the trade didn't. A woman came [282] up here from San Francisco, who was the author of the amendment evidently. I spent a couple of days with her right out there at the table where you are

seated, and as a result things that were new and strange and complex were straightened out and a whole series of cases that had been filed here had a very eminent result, and I am unable to understand why, in a matter so important as this to so many people, the same explanations could not have been offered. That is just because it would be difficult to explain the OPA's reasons and its position. Difficulty never excuses any of us from discharging public duties. I find it difficult to step from a boom maker's case into a turkey case or into a Jehovah's Witness case, and I find myself quite tired mentally and physically at times, but that is what I am paid for and I don't think that anything so important to the public interest, and that affects the public interest as this does, should be kept a mystery at all.

Now you were making an argument this morning in the brief time you did speak, Mr. Wetherall, that in Chicago in that situation there somebody found, and endeavored to enforce the finding, that a person had a certain status—I forget what it was; I think it was that he was the owner of 10 per cent or more of the stock, or something like that; that that would be a question which would be considered in the courts, but that would not be an attack on the validity of [283] the regulation. Now I wonder if to deny a man a classification as a wholesaler when, in fact, he has been a wholesaler, the same logic would apply to that.

Mr. Wetherall: It seems to me, your Honor, the distinction there is, the plaintiff in this case is not

contending that under the facts of his operation he qualifies as a wholesaler within the definition of the regulation. He is questioning that definition. He is attacking the validity of that definition. As I understand the case, he is not asserting that as a factual matter he qualifies as a wholesaler within the definition of Regional Order G-2.

Now it should be pointed out also that in the Illinois Packing case we were concerned with a question of subsidy, which question is specifically mentioned in Section 2 (m) as being a matter as to which a Court may entertain jurisdiction under the limitations imposed by the section. In this case, however, we do not have a matter which, according to its very nature, would come within the scope of Section 2 (m), inasmuch as here we are dealing with a price regulation. We are not dealing with a subsidy matter, the Government contract, or with any question of allocation or quota. There is that further distinction to be made.

The Court: Do you care to speak on the point that has been emphasized here, and was emphasized at the prior hearing, that this price, in fact, is not a ceiling price; that it was a [284] minimum sales and maximum price; it was a fixed price, but not of the sort authorized by the Act?

Mr. Wetherall: I should like to say this in that regard, your Honor: It is not exact to say that the maximum price, 2.8 cents a pound and 3.8 cents a pound, depending on whether or not the turkeys are boxed—that those maximum prices as prescribed in Order G-93 are also minimum prices.

The interpretation which was issued by the Regional Office under G-93 and upon which the District Office interpretation referred to by counsel was based, in effect provides that the maximum price is a minimum price only in the situation where the processor actually buys the turkeys which he processes. In situations where the processor performs strictly a custom processing, that is to say in situations where the processor processes the birds, then the Grower takes them back and disposes of them as he sees fit, there is no restriction whatsoever as a matter of minimum charge which the Processor can make for rendering that service. That is to say, in a strictly custom processing operation where the grower retains title to the birds and the processor is performing a service only there is no limitation. The processor can render that service for the charge, if he sees fit. He can charge 2.8 or anything less than 2.8. The limitation, or, rather, shall we say the floor on his processing charge comes into play only where, after processing turkeys, he buys them from the grower [285] and in that situation if the processor charges the grower a price less than the maximum price prescribed in Order G-93, and at the same time buys the dressed turkeys at the ceiling price under R.M.P.R. 269, in effect it is our position, as has been stated in the interpretation, that that constitutes an evasion of R.M.P.R. 269, which is the poultry price regulation, inasmuch as it constitutes an overpayment to the grower in the purchase by the purchaser of the processed turkeys.

Now that position is very clearly stated in the interpretation, is well supported by analogies which may be taken in other fields of price control, and is likewise sound in policy inasmuch as it was necessary to take that position in order to prevent evasions, not in regard to the service charge itself but in regard to the purchase of dressed turkeys by the processor, because in rendering the processing service at the price less than the maximum price in the service order G-93, the same time paying the ceiling price for the dressed turkeys, the processor is in effect paying the grower more for the dressed turkeys than the ceiling prescribed in the price regulation R.M.P.R. 269 governing the sale of the dressed turkeys.

Now as I say, there is no requirement that the purchaser charge the full ceiling price on his processing service where he does not buy the dressed turkeys from the grower. In that sense, your Honor, it is not correct to say [286] that the maximum prices in Regional Order G-93 are also minimum prices. They become minimum prices, shall we say, as a matter of terminology only insofar as we are concerned with the situation where the processor buys dressed turkeys from the grower and by charging less than the maximum price for the service is in effect returning to the grower an over-ceiling payment in the purchase of the dressed turkeys.

The Court: I would like to hear you, if you are willing to speak on it, which I hope you are, entirely without prejudice to your basic position that

I am entirely without jurisdiction in the case. I can say that and mean it just the way I said it. I welcome very much this discussion I am having with you. How can these regulations be applied one way in order that the men in the armed services can get turkeys and they can be applied in another way as to the civilian population?

Mr. Wetherall: Your Honor, I think there has been some confusion in connection with marketing of turkeys. There was a War Food order, I believe No. 96—isn't that correct, Mr. Skulason?

Mr. Skulason: I don't know.

Mr. Wetherall: A War Food Order, I think it is 96, which until 12:01 A.M. last Saturday, November 5, placed an absolutely 100 per cent embargo on the sale of any turkeys to the civilian market. Now the purpose of that order was simply to permit the Government Procurement Agencies to acquire a sufficient [287] supply of turkeys so that our armed forces could have their Thanksgiving dinners. Throughout the duration of that order it was illegal for anyone, be he a processor or a wholesaler, to sell turkeys on the civilian market unless those turkeys had been inspected by the Army and rejected—for some reason rejected.

The Court: Yes. We have had that heretofore. I understand that.

Mr. Wetherall: Rejected as not meeting the Army requirements. Therefore the question of supply to the civilian market is wholly ineffective.

The Court: At that time?

Mr. Wetherall: By the Price Regulation.

The Court: At that time, yes.

Mr. Wetherall: That is correct. Now as to what has occurred since the embargo was lifted last Saturday, I will be very frank to say I am not informed. I was led to believe that upon the termination of the War Food Order the Government would continue to take whatever turkeys it needed to fulfill its requirements, which I believe were about 60,000,000 pounds. The Government would do it on a contract basis, would go in and make contracts for acquiring whatever turkeys it needed, and I am not sure as to this but there was some discussion as to whether the turkeys should first be offered to the Procurement Agency in order that they might decide whether or not to take them before [288] they were turned into civilian channels. As I say, I am more or less speculating as to what the situation is now, since the embargo was lifted last Saturday.

However, I do think it is important to bear in mind that there is a distinction between the supply situation; there is a distinction between that and the price situation and the Office of Price Administration, of course, is not responsible for any situation which may be created by the War Food Embargo, or set aside, whether—

The Court: Now listen here, Mr. Wetherall. I am reading from this teletype, which authorized the agency arrangement of it:

“After very careful consideration of all aspects of the problem involved in this ruling”—this is

going back to the first paragraph, which I am not reading—"which has been re-examined because of Army difficulties in obtaining its poultry requirements"—now if the same regulations that we are dealing with here now would not work as a practical matter, so that the Army and Navy might get their requirements and a modification of them was necessary with this Agency Arrangement to make them work, and as a result of that modification the Army did get its requirements, why aren't the civilian population entitled to the same treatment?

Mr. Wetherall: I think I can explain that, your Honor, in this fashion: The interpretation of October 3rd, 1944, [289] which you have just referred to, and which emanated from the National Office of the OPA, states, as you have pointed out, that in order to facilitate the acquisition of turkeys by the Army it was thought necessary to permit the processor to establish an agency relationship with the grower whereunder he would be in a position to return to the grower full ceiling price which he might obtain upon sale of the turkeys to the Government, which price of course would include a one-cent selling addition which is allowed on all Government sales.

Now I take it that this is what that order has in mind, or that interpretation has in mind. It is possible—as I say, I am simply giving you my own opinion of the matter—it is possible that unless the growers were able to obtain any addition to the ordinary ceiling price on the dressed turkeys of one cent per pound selling addition, which would be al-

lowed on sales to the Government, it is possible they would have been inclined to withhold their turkeys from the market until such time as they felt, or, rather, until perhaps the Government Embargo would have been lifted. That may be what is in the back of their mind so far as the price interpretation is concerned, and it possibly was felt by the National Office in issuing that interpretation that by permitting a processor to set himself up as an agent for the grower in marketing the turkeys for the grower to the Government, upon which of course the full amount of the ceiling price could be [290] returned to the grower, inasmuch as the processor would be merely a channel for passing that price back to the grower—by permitting that to be done, possibly the movement of turkeys to the market would have been stimulated to such an extent that the Army would more quickly obtain its quota.

The Court: Well, this teletype came about as a result of this lawsuit that you are in right here now.

Mr. Skulason: That is right.

The Court: This lawsuit was brought on September 29th, and the first hearing on it before me was on I don't know what day. The testimony was all to the effect that because of these same regulations we are talking about now, despite the fact that an embargo was on all turkeys in favor of the armed services they were not going to get them because of the unworkability of these regulations, and so I received decisions on all questions, includ-

ing the jurisdictional question, because, for one reason, it had been testified to before me that this teletype had just come through, or its substance—something or other was said about this coming through—to take care of the situation we were dealing with then as a practical matter, and then a few days later when it did come through, why, Mr. Skulason sent me a copy of it, saying that the plaintiff and others were going ahead under it. Now, I repeat, the case comes up now for a further hearing and the plaintiff makes a showing that under the same regulations that we were [291] dealing with before the civilian demand would be supplied, and for the same reasons, that is; and so my question now is, why, if it was necessary and fair to relax the regulations in order to take care of the armed forces' needs, why the civilian population are not entitled to the same consideration, the plaintiff's interest aside?

Mr. Wetherall: As I understand plaintiff's position in that matter it is this: That the civilian market will not be supplied, so far as we are concerned, because, unless we are able to take the cent and a half markup allowed to wholesalers, we cannot operate, and for that reason——

The Court: The plaintiff's position is, unless I am misstating it, that if this word "Army" were not in the telegram, and if this last sentence were not here, "Nor does this interpretation permit the sharing or splitting of any part of a sale price or permitted decrease in other instances," which

means other than armed forces—if those words were not in that telegram he would be doing business with the civilian; is that right or not?

Mr. Skulason: Yes. I think so, your Honor.

The Court: Yes. So now I repeat my question, why, if this agency arrangement was deemed necessary by the OPA in Washington in order for the soldiers and sailors to get turkeys, why aren't the civilian population, the plaintiff's interest aside—I am talking about a whole lot of people outside of this courtroom [292] now, men, women and children—why aren't they entitled to the same consideration?

Mr. Wetherall: Well, the only answer I can give as to that is this: It often happens that a seller who is not satisfied with his price will withhold his commodity from the market, in the hope that he will ultimately be granted a higher price. As to that we are more or less impotent. Now I cannot say how the agency relationship would have any bearing on the supply of turkeys sold in the civilian market, unless for some reason or other a grower takes the position that he will not sell these turkeys to a processor unless the processor is in a position, under the Regulation, to serve as an agent for the grower—I am using a conflict in language there—that he will not market his turkeys rather than sell them.

The Court: Well, the case made before me is that if this applied to the civilian situation, as it did apply to the Army, that the same result would

follow and this blockade would be eliminated. That is the case that is made before me. If there is testimony to the contrary I will be glad to hear it.

Mr. Wetherall: It must be borne in mind that unless the processor is entitled to act as agent for the grower, the grower is not entitled to receive the one-cent selling addition on sales to the Government. [293]

The Court: Now let me tell you, Mr. Wetherall, what I think you are interested in, and let me tell you why I think you just can't stand on your broad proposition that I have no jurisdiction—that no judge anywhere has any jurisdiction to act in a case like this. The statute says that jurisdiction is withdrawn as to the validity of a regulation, but I don't think that withdraws jurisdiction as to discrimination of such a gross nature as this in the application of a regulation. I doubt very much—I am going to take it home with me tonight and ponder on it—the question whether or not with its own regulations, OPA can relax them in order to make them work as to one great group of people and deny that same relaxation in order that they may work as to another group of people. Now that is an important question I am going to take away with me, and that has nothing whatever to do with the validity of the regulation. It is in the way your own regulation is applied by you to the consumer population of the country, with reference to Army men on the one hand and civilians, including those in war industries, on the other.

Mr. Wetherall: Well, of course, we feel that that is essentially a question of the validity. I don't think there is involved in this case any question of any conduct on the part of the OPA officers which goes beyond the regulations themselves; and, by regulations, of course I include the Regional Orders, G-93 and G-3. [294]

The Court: Mr. Wetherall, I hope you don't maintain that you could apply an OPA regulation to one man and not apply it to his competitor and say that the validity of the regulation was involved if his competitor came up here, or, rather, if the one to whom it was applied came up here and said, "I am being driven out of business because a restrictive regulation is being applied to me, and for reasons, I know not what, they are not being applied to my competitor across the street."

Mr. Wetherall: We are not applying the regulations here, your Honor, to any one seller. We are applying these regulations and the Regional Orders to all sellers alike, as they may be affected by those regulations and orders. There is no question of that, so far as the Office of Price Administration is concerned. In fact, processors have acquiesced in these orders. They are observing these orders; at least, they are observing them until such time as perhaps they may be able to effect a change in a legal manner. I don't know as to that. I do have evidence that processors agree with the order—with the orders that are in favor of them. I point that out simply to indicate to your Honor that these are not 1-man orders, so

to speak. They are orders having general application to all processors and all persons who may be affected by them.

The Court: In District 8?

Mr. Wetherall: In Region 8, yes. [295]

The Court: In Region 8.

Mr. Wetherall: That is within the area prescribed.

The Court: Any more?

Mr. Skulason: I think that is all.

The Court: Adjourn until tomorrow morning.

(Thereupon, at 3:52 o'clock P. M., Court was adjourned.) [296]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, hereby certify that I reported all of the evidence given and all arguments made upon the trial of the above-entitled cause before the Honorable Claude McColloch, Judge of the above-entitled Court, on Thursday, November 9th, 1944; that I thereafter caused my shorthand notes to be reduced to typewriting, and the foregoing and hereto attached 113 pages of typewritten matter, numbered 184 to 296, both [297] inclusive, constitute a full, true and accurate record of all of the oral proceedings had and evidence given upon said trial on said date, and the whole thereof.

Dated at Portland, Oregon, this 31st day of March, A. D. 1945.

ALVA W. PERSON

Court Reporter

[Endorsed]: Filed April 3, 1945. [298]

[Endorsed]: No. 11028. United States Circuit Court of Appeals for the Ninth Circuit. Chester Bowles, Administrator of the Office of Price Administration, Appellant, vs. Northwest Poultry and Dairy Products Company, an Oregon Corporation, and C. W. Norton, President, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed April 6, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals of the United
States in and for the Ninth Circuit

No. 11028

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellant,

v.

NORTHWEST POULTRY AND DAIRY PROD-
UCTS COMPANY, an Oregon corporation,
and C. W. Norton, President,

Appellee.

STATEMENT OF POINTS

On the appeal taken in the above entitled action the appellant, Chester Bowles, Administrator of the Office of Price Administration, will urge and rely upon the following points:

1. The District Court erred in dismissing the action.

2. The District Court erred in failing to enforce the inspection requirement referred to in the complaint or application.

3. The District Court erred in holding that all the information which appellees were required to disclose was disclosed during the trial of Northwest Poultry and Dairy Products v. Chester Bowles, No. 2575, lately pending in the court below.

4. The District Court erred in failing to enter an order requiring appellees to permit the inspection and copying by authorized employees of Office

of Price Administration of the records described in the aforesaid inspection requirement.

HERBERT H. BENT

Acting Regional Litigation
Attorney

FRANZ E. WAGNER

District Enforcement At-
torney

Attorneys for the Appellant.

[Endorsed]: Filed June 21, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellant herein designates the entire certified transcript, including all exhibits, to be contained in the printed record on appeal herein.

HERBERT H. BENT

Acting Regional Litigation
Attorney

FRANZ E. WAGNER

District Enforcement At-
torney

Attorneys for the Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed June 21, 1945. Paul P. O'Brien, Clerk.

No. 11028

United States
Circuit Court of Appeals

For the Ninth Circuit.

CHESTER BOWLES, Administrator of the Office of Price Administration,

Appellant,

vs.

NORTHWEST POULTRY AND DAIRY PRODUCTS COMPANY, an Oregon Corporation, and C. W. NORTON, President,
Appellees.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

OCT 3 - 1945

PAUL P. O'BRIEN,
CLERK

No. 11028

United States
Circuit Court of Appeals

For the Ninth Circuit.

CHESTER BOWLES, Administrator of the Office of Price Administration,

Appellant,

vs.

NORTHWEST POULTRY AND DAIRY
PRODUCTS COMPANY, an Oregon Corporation, and C. W. NORTON, President,
Appellees.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

F. E. WAGNER and
CECELIA P. GALLAGHER,

1215 Bedell Building, Portland, Oregon,
and

W. DUNLAP CANNON, Jr.,

1355 Market Street, San Francisco, Calif.
for Appellant.

B. G. SKULASON,

Public Service Building, and

WILBER HENDERSON,

Porter Building, both Portland, Oregon,
for Appellees.

In the District Court of the United States
in the District of Oregon

No. 2565—Civil

CHESTER BOWLES, Administrator of the Of-
fice of Price Administration,

Applicant,

vs.

NORTHWEST POULTRY AND DAIRY
PRODUCTS COMPANY, an Oregon Cor-
poration, and C. W. NORTON, President,
Respondent.

APPLICATION FOR AN ORDER REQUIR-
ING RESPONDENT TO PERMIT IN-
SPECTION OF INVENTORY AND
RECORDS

Chester Bowles, Administrator of the Office of Price Administration, applicant herein, applies to this Honorable Court, pursuant to Section 202 (b) of the Emergency Price Control Act of 1942 as amended by the Stabilization Extension Act of 1944 (Pub. L. No. 421, 77th Cong., 2nd Sess., 56th Stat. 23, as amended by Pub. L. No. 383, 78th Cong., 2nd Sess.) for an order requiring Northwest Poultry and Dairy Products Company, a corporation, and C. W. Norton, its president, to permit inspection and copying by authorized employees of the Office of Price Administration of all purchase and sales records and disbursement records covering the sale and purchase by the Northwest Poultry and Dairy Products Company, of all turkeys from May 8,

1944, to and including August 10, 1944, as described in the Inspection Requirement herein referred to. In support thereof, applicant respectfully represents as follows:

I.

Respondent, Northwest Poultry and Dairy Products Company, is an Oregon corporation doing business at 232 S. E. Oak Street, Portland, Oregon, within the jurisdiction of this court. C. W. Norton is the president of said corporation.

II.

Jurisdiction of this proceeding is conferred upon this Court by Section 202(e) of the Emergency Price Control Act of 1942 as amended by the Stabilization Extension Act of 1944 (Pub. L. No. 421, 77th Cong. 2nd Sess., 56th Stat. 23, as amended by Pub. L. No. 383, 78th Cong., 2nd Sess.) hereinafter referred to as the Act.

III.

Under the provisions of Sections 202(a) and (b) of the Act the Administrator is authorized to obtain information by oath, affirmation, or otherwise, and to inspect and copy records and other documents, and inspect inventories, as he deems necessary or proper to assist him in the administration and enforcement of the Act and the regulations, orders or price schedules issued thereunder.

IV.

On or about the 1st day of August, 1944, the applicant, through his duly authorized attorney, de-

terminated that in the enforcement and administration of the Act and of Revised Maximum Price Regulation 269, as amended (7 F. R. 10708) issued by the applicant pursuant to the Act on December 18, 1942, and of Regional Order G-93 (F.R. 9-5287) issued on May 17, 1944, an investigation was necessary to discover whether or not respondents had complied and were complying with the provisions of the Act and of said orders.

Such an investigation was commenced on or about August 1, 1944, in the course of which duly authorized employees of the Office of Price Administration orally requested respondents to permit them to inspect and copy their records of purchase, sale, and disbursements, covering the sale and purchase by respondents of all turkeys purchased and sold by them between the dates of May 8, 1944, and August 10, 1944, which records were in their control and possession and required by the regulation to be made and kept by the respondents. On that occasion respondents, and each of them, refused to permit either the inspection or copying of said records or any part thereof.

V.

Thereafter on August 9, 1944, the applicant issued an Inspection Requirement, a copy of which is attached hereto, marked exhibit A, directing the respondents to permit D. E. Rodeback, as the duly authorized representative of the Office of Price Administration, to inspect and to copy all or any part of the following documents: All purchase and

sales records and disbursements records covering the sale and purchase by the Northwest Poultry and Dairy Products Company of all turkeys from May 8, 1944, to and including August 10, 1944.

Said Inspection Requirement was personally served on C. W. Norton, individually and as president of the respondent company, on the 14th day of August, 1944, at 232 S. E. Oak Street, Portland, Oregon, as shown by the affidavit of D. E. Rodeback, attached hereto, marked Exhibit B, and by this reference made a part thereof. Respondents, as further shown by this affidavit, refused to permit the inspection and copying of records as required. Since that time, although numerous demands have been made thereupon, respondents have not at any time permitted the inspection or copying their records.

VI.

The applicant is informed and believes, and therefore alleges that all of the records described in said Inspection Requirement constitute evidence which is competent, relevant and necessary in the said investigation and that such investigation is essential to the enforcement and administration of the Act and of Revised Maximum Price Regulation 269, as amended, and of Regional Order G-93. Applicant is informed and believes, and therefore alleges that said records described in said Inspection Requirement are now and at all times herein mentioned have been within the possession and control of the respondents.

Wherefore the applicant, Chester Bowles, as Ad-

ministrator of the Office of Price Administration, respectfully prays that

(a) An order to show cause be issued forthwith directing the respondents to appear before this Court on a day certain, to be fixed in said order, and show cause, if any there be, why an order should not issue requiring the respondents to permit the inspection and copying by authorized employees of the Office of Price Administration of the records described in said Inspection Requirement at such time as this Court may order; and

(b) The application of such other and different relief as may be necessary or appropriate in the premises.

F. E. WAGNER

District Enforcement Attorney

CECELIA P. GALLAGHER,

Enforcement Attorney

EXHIBIT A

United States of America
Office of Price Administration

INSPECTION REQUIREMENT

To: Northwest Poultry and Dairy Products Company of Portland, Oregon, by C. W. Norton, President.

In connection with an investigation to assist the Price Administrator, Office of Price Administration, in the administration and enforcement of the Emergency Price Control Act of 1942, as amended, and especially of the following:

Revised Maximum Price Regulation 269 and
Regional Order G-93.

You Are Hereby Forthwith Required to Permit D. E. Rodeback, representative of the Office of Price Administration, to inspect at your place of business the following documents:

All purchase and sales records and disbursements records covering the sales and purchase by the Northwest Poultry and Dairy Products Company of all turkeys from May 8, 1944, to and including August 10, 1944, and to permit the afore-said representative of the Office of Price Administration to copy all or any part of said documents, and

You Are Further Required to Permit the afore-said representative to inspect the following:

Now in your possession or under your control.

Issued this day of August, 1944, at Washington, D. C.

/s/ CHESTER BOWLES,

Price Administrator, Office of
Price Administration

Sections 202(a) and 202(b) of the Emergency Price Control Act of 1942 (Public Law 421 77th Cong., Chapter 26, 2nd Sess.) as amended, authorize the Price Administrator to make such studies and investigations of price and rent matters as he deems necessary and proper to assist him in prescribing any regulation or order under the Act, or in its administration or enforcement, and to require any person who is engaged in the business

of dealing with any commodity, or who rents or offers to rent or acts as broker or agent for the rental of any defense housing accommodations, to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of such housing accommodations. Under Section 4(a) of the Act, wilful refusal to obey this inspection requirement is a violation of the law, and under Section 205(b) any person guilty of such violation will be liable to a fine of not more than \$5000 or to imprisonment for not more than one year, or both. Under Section 205(a) such violation may also cause the issuance of a court order, the disobedience of which will render a violator subject to punishment for contempt of court.

EXHIBIT B

AFFIDAVIT

I, D. E. Rodeback, being duly sworn, depose and say:

1. I am a duly authorized investigator of the Office of Price Administration. I make this affidavit in support of the applicant's petition herein for an Order requiring respondent to permit inspection of Inventory and Records.

2. On August 1, 1944, Ernest Schallinger, Regional Commodity Investigator for the Office of Price Administration, and I went to the place of business of the Northwest Poultry and Dairy Prod-

ucts Company at 232 South East Oak Street, Portland, Oregon, and talked with C. W. Norton, president of the Northwest Poultry and Dairy Products Company, which company is hereinafter referred to as the Corporation. Ernest Schallinger and I identified ourselves to C. W. Norton as investigators for the Office of Price Administration. I am known to C. W. Norton and have formerly, on numerous occasions, talked with him in my capacity as such investigator.

3. During the course of our conversation with C. W. Norton I requested permission from him to inspect the records of the corporation which showed all purchases and sales and disbursements covering the sale and purchase by the Northwest Poultry and Dairy Products Company of all turkeys from May 8, 1944 to and including the date of my request. We further requested permission to copy such records. Mr. Norton stated to us that he could tell us anything we wanted to know but that he did not want us either to look at or to copy the records.

4. On August 3, 1944, I visited the corporation offices again and requested permission of C. W. Norton to inspect and copy the records described in paragraph 3 above. At that time Mr. Norton asked for additional time in which to talk to his attorneys. On August 4, 1944, at 10 o'clock a.m. I returned to the office of the corporation and was told by Mr. Norton that he had not completed his discussions with his Washington, D. C., attorneys and his Portland attorney.

5. On August 14, 1944, I served on C. W. Norton, as President of the corporation, an inspection requirement signed by Chester Bowles as Administrator of the Office of Price Administration, requiring the corporation and C. W. Norton, as President thereof, to permit me to inspect at its place of business the following documents: All purchase and sales records and disbursements records covering the sale and purchase by the Northwest Poultry and Dairy Products Company of all turkeys from May 8, 1944, to and including August 10, 1944, and to permit me to copy all or any part of said documents. That C. W. Norton, President of said corporation, did at that time, and has since consistently refused to permit the copying of any of the above described documents and records.

6. That the business of the corporation is such that the number of transactions are extremely numerous and cover a long period of time. That each document would cover only a small portion of a day or a week's business and it would be impossible to retain in memory sufficient details to establish the extent of any violations. I have good cause to believe that violations of both Revised Maximum Price Regulation 269 and Regional Order G-93 have been committed by the said corporation by the failure of the corporation to deduct from its payments to producers of turkeys the full charges provided by Regional Order G-93 for dressing and head wrapping of turkeys sold by producers to the said corporation.

DONALD E. RODEBACK

Subscribed and sworn to before me this 8th day of September, 1944.

(Seal) W. A. STOCKMAN,
Notary Public in and for the
State of Oregon

My commission expires January 20, 1947.

[Endorsed]: Filed Sept. 9, 1944.

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION
OF RECORD

Comes now the plaintiff above named and as appellant in the above entitled action submits the following as his Supplemental Designation of Record on the appeal of said matter to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Application for order requiring respondent to permit inspection of inventory and records.
2. This supplemental designation.

Dated at Portland, Oregon, this 27th day of August, 1945.

CECELIA P. GALLAGHER,
of Attorneys for Appellant.

[Endorsed]: Filed August 30, 1945.

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 8 inclusive constitute the additional transcript of record on appeal in a cause numbered Civil 2565, in which Chester Bowles, Administrator, Office of Price Administration, is plaintiff and appellant, and Northwest Poultry and Dairy Products Company, an Oregon Corporation, and C. W. Norton, President, are defendants and appellees; that the said transcript has been prepared by me in accordance with the supplemental designation of record filed by the appellant and in accordance with the rules of this court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said supplemental designation, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 1st day of September, 1945.

(Seal) LOWELL MUNDORFF,
Clerk.

By F. L. BUCK,
Chief Deputy.

[Endorsed]: No. 11028. United States Circuit Court of Appeals for the Ninth Circuit. Chester Bowles, Administrator of the Office of Price Administration, Appellant, vs. Northwest Poultry and Dairy Products Company, an Oregon Corporation, and C. W. Norton, President, Appellees. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed September 4, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 11,028

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellant,

vs.

NORTHWEST POULTRY AND DAIRY PRODUCTS
COMPANY (an Oregon corporation), and
C. W. NORTON, President,

Appellee.

BRIEF FOR APPELLANT.

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NORTHWEST POULTRY AND DAIRY PRODUCTS
COMPANY (an Oregon corporation), and
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Appellee.

BRIEF FOR APPELLANT.

JURISDICTION.

This is an appeal by the Price Administrator from an order of the District Court for the District of Oregon (Honorable Claude McColloch, District Judge) dated December 2, 1944, denying the appellant's application to permit inspection of the records of the appellee, Northwest Poultry and Dairy Products Company (R. 26-27). Jurisdiction of the District Court was invoked under Title II of the Emergency Price Control Act of 1942—56 Stat. 29 et seq. 50 U. S. Code App. Secs. 921, et seq.—hereinafter referred to as the Act—as amended by the Stabilization Extension Act

of 1944 (58 Stat. 840). Notice of appeal was filed February 27, 1945 (R. 27). Jurisdiction to hear and determine the appeal is conferred upon this Court by Section 128 of the Judicial Code (28 U. S. Code 225).

STATUTES AND REGULATIONS INVOLVED.

Sec. 2 of the Act (50 U. S. Code App. Sec. 902) authorizes the Price Administrator, whenever in his judgment "the price or prices of a commodity or commodities have risen or threatened to rise to an extent or in a manner inconsistent with the purposes of the Act, * * * (to) establish such maximum price or maximum prices as in his judgment will be generally fair and equitable, and will effectuate the purposes of the Act."

By Sec. 4 (a) it is made unlawful for any person to sell or deliver any commodity, or otherwise to do or omit to do, any act, in violation of any regulation or order under Sec. 2, or of any regulation, order or requirement under Sec. 202 (b).

Sec. 202 of the Act authorizes the Administrator to make investigations and obtain information which he deems necessary or proper to assist him in the administration or enforcement of the Act and regulation thereunder. The material provisions of Sec. 202 involved here are as follows:

"SEC. 202. (a) The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such informa-

tion as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpoena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpoena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person

under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents

(e) In case of contumacy by, or refusal to obey a subpoena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

* * * * *

(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege."

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such

person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Revised Maximum Price Regulation 269, as amended (7 F. R. 10708), was issued pursuant to the Act on December 18, 1942. This regulation establishes ceiling prices for the sale of certain poultry items named therein, including turkeys. Section 1429.4 reads as follows:

“§ 1429.4. Records and reports. (a) Every seller and purchaser subject to this Revised Maximum Price Regulation No. 269 making sales or deliveries or purchases of poultry items to the value of \$200.00 or more in any one month, after December 21, 1942, shall keep for inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942 remains in effect a complete and accurate record of each sale or delivery of poultry items, showing the date of purchase or sale, the name and address of the buyer and seller, the quantities, types, grades, weight classes of poultry bought and sold, the number of head of each type, grade, and weight class of poultry bought and sold, the type of sale made (delivered or nondelivered), and the price paid or received.

(b) (This subdivision requires shippers of poultry items to post within freight cars, etc., certain information regarding the poultry items shipped.)

(c) Every seller and purchaser subject to this regulation shall keep such other records in

addition to or in place of the records required in paragraphs (a) and (b) of this section and shall submit such reports to the Office of Price Administration as that Office may from time to time require or permit."

Section 1429.5 of the Regulation reads as follows:

"§ 1429.5. Evasion. Price limitations set forth in this Revised Maximum Price Regulation No. 269 shall not be evaded whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to, the commodities prices of which are herein regulated, alone or in conjunction with any other commodity, or by way of commission, service, transportation, or other charge, or discount, premium, or other privilege or other trade understanding or otherwise."

Regional Order G-93 (F. R. 9-5287) was issued on May 2, 1944. It is printed at length at pages 23-24 of the Record. Under its provisions purchasers (processors, wholesalers, etc.) of turkeys from growers were required to charge a certain specified amount for the service of "custom processing" of live turkeys in the Eighth Region which includes the State of Oregon. By an official interpretation of this regulation (set forth in full at pages 24-26 of the Record) charges for the processing service of less than the prices fixed in the order were regarded as attempts to evade Revised Maximum Price Regulation 269.

STATEMENT OF FACTS.

Appellee, Northwest Poultry and Dairy Products Company, is an Oregon corporation engaged in the business "of wholesaler, processor and purchaser of turkeys" (R. 5). It is the largest dealer in turkeys in the State of Oregon, and handles one out of every three turkeys in that state (R. 51), with an annual volume of business running to \$4,000,000 in turkeys and \$4,000,000 in allied products (R. 118). As a dealer in this commodity, the corporation was subject to the Act and to Revised Maximum Price Regulation 269 (hereinafter referred to as RMPR 269) issued by the Price Administrator pursuant to Section 2(a) of the Act. Under Section 202(b) of the Act the Administrator is authorized to require any person engaged in the business of dealing in any commodity to make and keep records or other documents and to require any such person to permit the inspection and copying of these records and documents as well as the inspection of inventories. RMPR 269 requires the seller to keep *for inspection* by the Office of Price Administration, certain records pertaining to the purchase and sale of poultry (Sec. 1429.4). A violation of the regulation is a violation of the Act (Sec. 4(a)).

On or about August 1, 1944, the appellant determined¹ that in the enforcement and administration of the Act, of RMPR 269 and of Regional Order G-93, an investigation was necessary to discover whether or not appellee had complied and was complying with the provisions of the Act and of said regulation and

¹Supp. Tr. of Record, p. 341.

order. An investigation was commenced, in the course of which the appellee was requested to permit inspection and copying of the corporation's records of purchases, sales, and disbursements covering the sale and purchase of all turkeys purchased and sold by appellee between May 8, 1944 and August 10, 1944 (Supp. R. 342). It is admitted that the records were in the possession of the appellee (R. 5, line 6). Thereafter, a formal inspection requirement (Supp. R. 344-346) was duly issued and served upon appellee, whereby it was required to permit a representative of the Office of Price Administration to inspect all purchases and sales records and disbursement records covering the sales and purchases by the company of all turkeys between said dates, and to permit the copying thereof. Appellee declined to comply with this requirement (R. 160).

On September 19, 1944, the Administrator filed an application with the District Court for an order requiring the appellee to permit the inspection and copying of the sales and purchase records described in the inspection requirement (Supp. R. 340-349; R. 2-3). In response to the order to show cause, the appellee filed a return (R. 3-4) and an answer (R. 14-26). *The sole ground upon which the application for inspection was resisted was the alleged invalidity of the Administrator's Regional order G-93.* This appears both from the answer and return, and from the opening statement of the attorney for the appellee: "the reason that we are resisting the application for the examination of the records is that we contend that this order (G-93) is invalid on two principal grounds"

(R. 31). Simultaneously with its answer, the appellee filed, as plaintiff, an action for declaratory judgment asking the District Court to declare the Order G-93 and certain other regulations of the Price Administrator unconstitutional and invalid (R. 31-32). The Court ordered the Administrator's application for the inspection requirement and the respondent's action for declaratory judgment to be tried jointly (R. 64). After trial, the Court dismissed appellee's action on the ground that jurisdiction to review the validity of regulations issued by the Price Administrator was exclusively vested in the Emergency Court of Appeals by Section 204(d) of the Act. No appeal was taken from this judgment of dismissal.

With respect to the Administrator's application to inspect appellee's records, the Court entered an order denying the same and dismissing the cause. The order was based on the ground that "all of the information that is required herein was disclosed by defendant and its counsel during the trial of the said other case" (R. 26). The appeal herein is from this order.²

While no formal findings of fact were made below, the Court spoke its mind frequently throughout the trial, commenting freely on the evidence and what it considered to be the legal issues involved, and ad-

²The record on appeal herein incorporates the transcript of evidence in the companion case in which the corporate appellee was plaintiff, since the two cases were tried together without much attempt to restrict evidence to the respective case to which it may have had relevance, and since the District Court expressly founded its reason for dismissal on the conclusion that the information requested by the appellant was disclosed during the trial of the companion case.

vanced numerous objections to the Administrator's application in addition to the ground finally assigned for its denial of the application. All of the contentions in opposition to the application to permit inspection were originated by the trial Court *sua sponte*.

Thus the Court implied that an expressly admitted violation and flouting of the regulation makes it unnecessary to inspect the violator's records (R. 177, 196); that the appellee, a corporation, could invoke the constitutional guarantee against self-incrimination in resisting inspection of the records (R. 197-199); that in applying for the order to compel appellee to comply with the inspection requirement, appellant was invoking the Court's discretion (R. 161) and that as a prerequisite to the exercise of such discretion the appellant had to satisfy the Court as to the existence of probable cause for believing that the Act had been violated (R. 164, 168-170).

The principal issue in the case is whether a person subject to the Emergency Price Control Act and regulations issued thereunder may be excused from complying with an administrative inspection requirement, reasonably limited in scope and clearly pertinent to the enforcement of the Act, merely because testimony offered by him in resisting the Administrator's application to enforce compliance is deemed by the Court to be a satisfactory substitute for the inspection of his records.

SUMMARY OF ARGUMENT.

Record-keeping requirements are the heart and foundation of price stabilization and control. To carry out these purposes, Congress clothed the Administrator with authority to inspect and copy the records required to be kept by persons subject to the Act. In RMPR 269, the Administrator duly exercised this authority by requiring persons subject thereto to keep records and to make them available for examination. The records which the Administrator sought to examine in this case were of that type. The information sought was reasonably limited in scope and clearly pertinent and relevant to the enforcement of the Act. The inspection requirement to which the appellant sought to compel obedience was therefore a lawful exercise of the Administrator's investigatory power, and appellee's persistent refusal to allow examination was wholly unjustified.

The fact that appellee testified that he had violated the regulation or order of the Administrator, far from being a proper ground for dismissing the application to enforce compliance with the inspection requirement, was cumulative ground for directing compliance. The Court's offer of this testimony to the Administrator in lieu of the inspection authorized by Congress, and its holding that the Administrator should be satisfied therewith, is an attempted usurpation of the Administrator's investigatory power and a wholly invalid exercise of the judicial function. The statutory and constitutional standards by which the right of inspection may be properly tested by the Court were duly met

and no objection was raised with respect thereto; the presumption of regularity which normally attends an administrative proceeding was neither rebutted nor overcome; and the Court had no facts before it upon which to base any discretion to refuse the statutory relief prayed for by the Administrator.

ARGUMENT.

I.

THE COURT BELOW ERRED IN EXCUSING APPELLEE FROM COMPLYING WITH THE INSPECTION REQUIREMENT. THE COURT'S BELIEF THAT APPELLEE'S TESTIMONY WAS A SATISFACTORY SUBSTITUTE FOR THE ACTUAL INSPECTION OF APPELLEE'S RECORDS BY THE ADMINISTRATOR WAS NOT A PROPER GROUND FOR DENYING THE APPLICATION.

The question presented in this case is whether the Price Administrator is barred from inspecting business records which a person subject to a regulation is required to keep, merely because that person has testified in a proceeding brought to enforce an inspection requirement, or in another cause, and the Court deems this testimony to be a satisfactory substitute for the inspection. The Act does not provide or even intimate that the Administrator's right to inspect may be defeated by the testimony of a party as to any facts sought to be elicited by the inspection, or that the Administrator may be compelled to accept any such testimony in lieu of the inspection. Yet, it is this very substantial proviso, an implied condition subsequent as it were, which the Court below attempts to read

into the Act. The provisions of the Act which give the Administrator authority to require the keeping of records and the right to examine them are as broad and free from limitation as language can make them. The Act authorizes the Administrator to make investigations and obtain information which he deems necessary or proper to assist him in prescribing any regulation or in the administration or enforcement of the Act and regulations issued thereunder (Sec. 202(a)). The Administrator is further authorized, by regulation or order, to require a person subject thereto, to make and keep records and permit inspection of them (Sec. 202(b)). No substitute for this inspection is provided or contemplated by the Act.

Without the untrammelled right to inspection of records required to be kept, the purpose of the Act would be easily frustrated. These purposes, and the construction to be given to Section 202 of the Act, are set forth by this Court in *Bowles v. Glick Bros. Lumber Co.*, 146 F. (2d) 566, certiorari denied June 11, 1945. The Court there said (pp. 570-571):

“It is thus seen that dealers are required by the Act to keep such informative records as the Administrator may direct and to permit the Administrator, upon request, to inspect and copy them. These requirements are an essential part of the Congressional scheme of price stabilization and control. It is hard to see how the purposes of this vital wartime legislation could be achieved without them. To effect the end desired Congress clothed the Administrator with regulatory and investigatory powers commensurate with his re-

sponsibilities, arming him both with authority to inspect and with the power of subpoena. The regulations on the subject are in harmony with the statute. * * *”

This language was quoted and followed in *Bowles v. Insel*, 148 F. (2d) 91, 93 (C.C.A. 3rd 1945). Similar views were expressed by the Court of Appeals for the District of Columbia in *Cudmore v. Bowles*, 145 F. (2d) 697 (App. D. C., 1944), cert. denied, 65 S. Ct. 588; *acc.*, *Bowles v. Rothman*, 145 F. (2d) 831 (C.C.A. 2d 1945).

In denying the Administrator's application to enforce compliance with the inspection requirement, the District Court based its decision on the sole ground *that it appeared to the Court that* “all of the information that is required herein was disclosed by the defendant and its counsel” in the trial of another case (R. 26). Thus the Court concluded that it had the right to pass on both the character and quantum of the information sought by the Administrator and that it had the further right to impose on the Administrator the testimony of appellee in lieu of the inspection of the appellee's original records and documents.

This decision by the Court was wholly unauthorized. The basic grant of authority for investigations is found in Section 202(a) of the Act, which authorizes the Administrator “to make such studies and investigations and to obtain such information *as he deems* necessary or proper to assist him in prescribing any regulation or order under this Act or in the adminis-

tration or enforcement of the Act and regulations, orders, and price schedules thereunder". The language compels but one conclusion—that the Court below could neither prescribe for the Administrator an alternative method for obtaining the information nor determine what information must satisfy the Administrator. The information which Congress authorized the Administrator to secure was that which he deemed necessary and not that which the learned Court below deemed necessary.

The arrogation by the Court of such functions to itself constituted a usurpation of the Administrator's authority in an area peculiarly and specifically confined to the Administrator by Congress. Such usurpation has been repeatedly condemned even when courts were called upon to review conclusions drawn by administrative agencies from conflicting evidence: *Swayne & Hoyt v. U. S.*, 300 U. S. 297, 304; *Manufacturers Railway Company v. U. S.*, 244 U. S. 457, 487, and the numerous decisions following these cases.

"If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so.": *Securities and Exchange Commission v. Chenery Corp.*, 318 U. S. 80, 94.

The judicial function is exhausted when there is found to be a rational basis for the *conclusion* of an administrative body: *Montana Power Co. v. Federal*

Power Com., 112 F. (2d) 371 (C.C.A. 9th, 1940); *Rochester Tel. Corp. v. U. S.*, 307 U. S. 125, 146, and cases there cited. *A fortiori*, the Court below transgressed its judicial function when it assumed to impose on the Administrator specific information as a basis for arriving at his conclusion.³

The Court's order in the instant case evidently stemmed from an entire misconception of the administrative investigatory function and the respective and complementary functions of courts and administrative agencies. The Court treated the application for enforcement of the inspection requirement as an application for discovery in an action pending before the Court ("I know that (it) is discovery": R. 164; see also pp. 168, 196).

But the Administrator was not in the position of a party seeking discovery in a litigated case before the Court. He was attempting to carry on an investigation in the exercise of a power specifically delegated to him by Congress. The investigation was part of a legislative and executive function which could not be interfered with by the Court. Cf. *National Labor Relations Bd. v. Waterman S. S. Corp.*, 309 U. S. 206, 208-9. As was stated by Judge Learned Hand in *McMann v. Securities and Exchange Commission*, 87 F. (2d) 377, 379 (C.C.A. 2nd, 1937):

"The attempted investigation may indeed lack legal sanction * * * and the officer who conducts it

³It has also been repeatedly held that where Congress has delegated to an administrative authority a certain field of governmental activity, the Courts will not interfere until the administrative proceedings have been concluded. *U. S. v. Kauten*, 133 F. (2d) 703, 706 (C.C.A. 2d 1943), and cases there cited.

will then stand no better than any other interloper; but if it be duly authorized, it is no more subject to obstruction than judicial proceedings.”

Nor could the Court below properly turn this summary proceeding to enforce a subpoena into a lawsuit to determine questions which must be decided by the Administrator in the course of his investigation. In *Martin Typewriter Co. v. Walling*, 135 F. (2d) 918 (1943), the Circuit Court of Appeals for the First Circuit affirmed an order enforcing an administrative subpoena, quoting with approval the following language from the memorandum opinion of the Court below (at p. 919):

“This is an application to enforce a subpoena in what appears on its face to be an authorized and orderly investigation, and I do not feel justified in turning it into a lawsuit to decide a question which must be decided by the administrator in the course of his investigation, and which, if decided wrong, can be corrected later in a proceeding to enforce the order of the administrator.”

The Court below believed that unless it treated the application as one for discovery, it became a mere rubber stamp (R. 190). It is submitted that in this conception of its role the Court was obviously in error. The function of the Court in connection with the enforcement of an administrative subpoena is anything but ministerial and automatic. The Court has important judicial functions to perform in testing the Administrator's right to a subpoena, by applying certain well-defined standards for the protection of the

individual's constitutional rights. Thus, in a proper case a witness may be protected against self-incrimination; cf. *Boyd v. U. S.*, 116 U. S. 616. The administrative subpoena might be set aside because it is unduly vague and unreasonably oppressive; cf. *Hale v. Henkel*, 201 U. S. 43; *Federal Trade Comm. v. American Tobacco Co.*, 264 U. S. 298. The Court may find that the subpoena was not issued by the person vested with the power; cf. *Cudahy Packing Co. v. Holland*, 315 U. S. 357; or, finally, that the evidence sought is not germane to any lawful subject of inquiry.

None of these or any other valid defenses were or could have been urged here. In the instant case the materiality of the documents is unquestioned and they are sufficiently and clearly described in the inspection requirement. The inspection requirement was reasonably limited in scope and called only for documents relevant to the injury (cf. *Walling v. Ralbal Corp.*, 135 F. (2d) 1003 (C.C.A. 2d, 1943); *Brown v. U. S.*, 276 U. S. 134, 143). Because of the well-established presumption of regularity attending acts of administrative agencies, the mere fact that the Administrator issued an inspection requirement is sufficient to show that he deemed the information sought here necessary or proper to aid in the administration and enforcement of the Act and that he has not acted oppressively or undertaken to pursue investigations where no need therefor is apparent (*Bowles v. Glick Brothers Lumber Co.*, *supra*, 146 F. (2d) at p. 571; *Mississippi Road Supply Co. v. Walling*, 136 F. (2d) 391, 394 (C.C.A. 5th), cert. denied, 320 U. S. 752; *McGarry v. Securi-*

ties & Exchange Commission, 147 F. (2d) 389, 393 (C.C.A. 10th, 1945)). Appellees have, of course, utterly failed either to rebut or overcome this presumption: as was shown above (Statement of Facts), they resisted the application for inspection solely on the ground of the alleged invalidity of the regulations.

The inspection requirement "should have been obeyed without recourse to the Court": *Cudmore v. Bowles*, 145 F. (2d) 697, 698 (App. D. C., 1944), cert. denied, 65 S. Ct. 588. The Court had no facts before it upon which to base any discretion to refuse enforcement of the inspection requirement.

II.

IN ANY EVENT, THE INFORMATION DISCLOSED BY APPELLEE DURING THE HEARING WAS NOT "ALL OF THE INFORMATION REQUIRED" BY THE ADMINISTRATOR.

Not only did the Court below grossly misconceive the nature of the judicial function he was called upon to exercise in acting upon appellant's application: he also failed utterly to comprehend the objectives sought to be accomplished by the Administrator in requesting appellee to comply with the law by permitting the inspection of the "quasi-public" records under its control. As disclosed by the very language of Section 202(a) of the Act, the Administrator utilizes the information obtained by such inspections (1) in prescribing regulations and orders pursuant to the congressional mandate, (2) in the administration of such orders, and (3) in the enforcement of the Act and the

various regulations, orders, and price schedules issued thereunder. The tremendous task of fixing the prices of numberless commodities subject to price control so that they will be "generally fair and equitable" in the complex workings of our war economy and of enforcing a program for that purpose cannot be accomplished unless precise and comprehensive information is made readily available.

With these general objectives in mind, an examination of the record below shows no support whatever for the Court's conclusion that "all of the information that is required herein was disclosed by defendant and its counsel during the trial of said other case." Virtually the only information supplied was the admission that the company was doing business in contravention and defiance of the regulation. The exact amount of sales made, the dates thereof, the prices for which it bought and sold its turkeys, etc.—all was left to speculation. Not a single document relating to the operation of appellee's business was produced, nor any concrete evidence of any sort. The only specific violation admitted by the appellee was the payment to growers of turkeys of a higher ~~price~~ ^{price by} processing charge than was permitted under the regulation (R. 167.)

The Administrator, for example, desired to discover the price for which appellee sold turkeys which were rejected by the Army. The District Court, however, did not deem this information relevant for the reason that it "comes under the heading of *de minimis non curat lex*" (R. 182). Yet the annual volume of these

sales amounted to a possible \$80,000.⁴ Also, the Administrator advised the Court that he desired to investigate the records of appellee to discover details regarding its export sales (R. 184-185) and sales to the Army and Navy. The Court did not “deem it necessary”, however, stating that “I would not think that in a large, notorious transaction like that it would be much of a field for investigation for evasion” (R. 190).

Congress has placed several sanctions in the hands of the Administrator, who may determine which particular sanction should be invoked, the decision depending upon the particular facts involved in each case. For example, a treble damage action might be instituted pursuant to Section 205(e) of the Act, or a suit for injunction could be brought (Section 205(a)), or a license suspension action commenced under Section 205(f)(2), or the case could be referred to the United States Attorney for appropriate criminal action. The inconclusive “evidence” which the Court below “developed” (R. 196) was not only useless to the Administrator for purposes of prescribing and administering the regulations, but in addition failed to provide an adequate basis upon which an intelligent selection of the proper sanction could be made. Furthermore, the lower Court’s suggestion (R. 199-200) that the government should institute an action, the sole basis of which is an admitted violator’s oral statement, without first verifying that statement by an examina-

⁴Possibly two per cent (R. 182) of a \$4,000,000 business (R. 118).

tion of his records (which he is required to keep for this specific purpose), is, to say the least, unique.

The import of the lower Court's decision is startling. It amounts to this: *admitted violators of the Act are exempt from its provisions relating to examination and inspection of documents.* It may be doubted whether the Court below intended to make a holding of this kind. However, the conclusion is unescapable. The Court actually dismissed the Administrator's application *because* the person sought to be investigated admitted being in violation of the Act.

III.

THE OTHER GROUNDS FOR DENYING THE APPLICATION STATED BY THE COURT BELOW IN THE COURSE OF THE TRIAL ARE INAPPROPRIATE.

In the strange trial which took place below,⁵ the only contest on the issues presented by the application was that between the Administrator and the Court, rather than between the parties to the proceeding. The appellee rested its entire defense on the invalidity of the regulations. All the contentions with regard to the propriety of the application for inspection were ad-

⁵The Court's jurisdiction was invoked under the Act for the specific purpose of testing the Administrator's right to an inspection of appellee's records. The Court turned the trial of this issue into an administrative investigation designed to "develop" testimony in lieu of such inspection, with the Court himself holding the investigation, asking all the questions, and completely taking over the conduct of the case for appellee. Cf. *Martin Typewriter Co. v. Walling*, 135 F. (2d) 918, 919 (C.C.A. 1st, 1943).

vanced by the Court on its own initiative. These contentions will be briefly noted.

The Court spoke freely regarding the appellee's right to protection against self-incrimination (R. 197-199). However, the inspection requirement related only to the records of the corporate appellee, and only to those records which it was its duty to keep under the Act and regulations. These were quasi-public records which appellee may be compelled to produce even though their contents may tend to incriminate it, and the constitutional privilege against self-incrimination does not extend to such records: *Bowles v. Glick Bros. Lumber Co.*, 146 F. (2d) 566 (C.C.A. 9th, 1945), cert. denied June 11, 1945; *Bowles v. Cudmore*, 145 F. (2d) 697 (App. D. C. 1945), cert. denied, 65 S. Ct. 588; *Bowles v. Insel*, 148 F. (2d) 91 (C.C.A. 3rd, 1945); and in any event, the claim of privilege is only available to a natural person and not to a corporation: *U. S. v. White*, 322 U. S. 694, 64 S. Ct. 1248 (1944).

The Court also definitely and repeatedly ruled⁶ that the Administrator had to establish probable cause for believing that a violation occurred, as a prerequisite to the right to enforce inspection of the records. This, of course, is not the law: *Bowles v. Glick Lumber Co.*, *supra*, 146 F. (2d) 566 at p. 571; *Bowles v. Insel*, *supra*; *Bowles v. Cudmore*, *supra*; *Bowles v. Rothman*, *supra*.

⁶When counsel for appellant stated that it was not necessary to show any facts indicating probable cause, the Court replied: "That would be between you and me and the appellate court" (R. 170). At pages 167 to 169, the entire colloquy between the Court and counsel for appellant relates to the Court's insistence on facts indicating probable cause. See also pages 188-189.

CONCLUSION.

It is respectfully submitted that the order of dismissal should be reversed and the cause remanded with instructions to grant the relief requested by the Administrator in these proceedings.

Dated, October 5, 1945.

Respectfully submitted,

GEORGE MONCHARSH,

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No. 11,028

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

**CHESTER BOWLES, Administrator, Office of
Price Administration,**

Appellant,

vs.

**NORTHWEST POULTRY AND DAIRY
PRODUCTS COMPANY (an Oregon corpor-
ation), and C. W. NORTON, President,**

Appellees.

BRIEF FOR APPELLEES

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FILED

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PAUL P. O'BRIEN,

CLERK



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BRIEF FOR APPELLEES

STATEMENT OF FACTS

On or about the 1st of August, 1944, the Appellant determined that an investigation of the books and accounts of the Appellees was necessary in connection with the enforcement of Regional Order G-93 issued on May 17, 1944, "to discover whether or not Respondents had complied and are complying with the provisions of the Act and of said Orders." (Tr. 342)

A request was made that the Appellees permit the inspection and copying of their records relating to the

“purchase, sale and disbursements, covering the sale and purchase by Respondents of all turkeys purchased and sold by them between the dates of May 8, 1944 and August 10, 1944 ***.” (Tr. 342) It is alleged in paragraph VI of the application (Tr. 343) that the Applicant believed that Appellees records “constitute evidence which is competent, relevant and necessary in the said investigation and that such investigation is essential to the enforcement and administration of the Act and of Revised Maximum Price Regulation 269, as amended, and Regional Order G-93.”

The Appellees made a return to the Order to Show Cause (Tr. 3) and set out in full Order G-93, together with the definitions appended to it. The order among other things provided as follows:

“The above prices are the **only** prices which may be charged for processing services. Any charge of less than the prices fixed in this Order will be considered an attempt to evade Revised Maximum Price Regulation 269. Charges of more than those prices would be in outright violation of this Order.”

Later, the Appellees filed an answer to the application, wherein it is alleged that the Appellees believed that Order G-93 is void for various reasons (Tr. 15) and deny certain of the allegations of the application. In a separate and affirmative answer, (Tr. 16) the

Appellees pleaded, among other things, that a custom had existed in the trade for a long time for handling turkeys on a per head basis at certain prices. Reference is then made to Order G-93 and the definitions relating thereto, the chief departure from the above custom being that turkeys must, under the order, be handled on a per pound basis charged to the growers, which, it is alleged, would amount to such an excessive charge that the growers would not submit to it.

It is alleged that on October 2, 1944, there was issued from the OPA office in Washington a regulation which permitted the Appellees and those in a like position to handle turkeys as agents for the growers, and that, ever since the issuance of this regulation, the Appellees had complied with it and were continuing to do so. (Tr. 20).

Paragraph XII of the Answer (Tr. 20) reads as follows:

“Previous thereto the respondents had not complied with said Order G-93 for the reason that they could not do so without jeopardizing their said business.”

Paragraph XIII reads as follows: (Tr. 20)

“As a result of said modification of order G-93 no reason remains for the application herein for the examination of the books, records and accounts of the respondents, unless the applicant is seeking

evidence to be used as a basis for a complaint in an action for damages against the respondents for an alleged violation of the Emergency Price Control Act and regulations thereunder or as a basis for a criminal prosecution of the respondents for such alleged violations."

Respondents pleaded (Tr. 21) and proved without dispute that they are amply able to respond in any damages that might be assessed against them.

Miss Gallagher (Tr. 52) stated, in effect, that the Appellant wished to look at the records of the Appellees to build up a case against them and (Tr. 72) she said "So far in this situation we have no information on which to base the proper kind of a lawsuit." This specific Regional Order G-93 was considered by a large number of growers from Washington and Oregon at a meeting held in Portland on September 11, 1944, at the request of the OPA (Tr. 64) and was declared to be unreasonable and should not be enforced. Certain changes were suggested to make it workable (Tr. 65).

At page 66 of the transcript there is a letter addressed by the head of the National Turkey Federation to Mr. Haldeman of the OPA, dated September 18, 1944, wherein G-93 is analyzed and it is contended that it is unreasonable and unworkable and should be revoked, it being stated that the attempt to enforce it is the

result of the vanity or poor judgment of the one person who issued it.

At page 71 of the transcript, Miss Gallagher stated that if the inspection were allowed, "Then we could bring an injunction suit in order to ask him to be enjoined."

Mr. Norton (Tr. 126) explained in detail the result of compliance with this order, stating that under it there would have to be a raise in the charge to the grower of an average of 40c a head. At page 129 of the transcript he testified that since the order went into effect on May 8th, "there has been nothing but confusion among everyone, dealers and growers alike." He said that this applied to the entire state, except the cooperatives.

Mr. Norton further testified (Tr. 130):

" Well, it is unbelievable to me that an order of that kind could possibly come out where it sets a minimum charge that we had to charge a grower, setting up a price in excess of what it cost us to do that job, was beyond me. I still can't believe that an order of that kind could come out."

He further testified (Tr. 136) that the order had been modified so as to allow the wholesaler-processor to act as an agent for the grower and that (Tr. 139) under this modification, "We will be right back to where we

were before this order came out, before G-93 here ever came into existence." See plaintiff's exhibit 3 (Tr. 286).

Mr. Norton testified (Tr. 121) regarding the custom existing in the trade before the promulgation of OPA regulations that,

"The custom ever since the processors and wholesalers started to dress turkeys has been to buy the turkeys from the growers on the dressed weight and grade, and charging the growers for the service, picking and/or hauling, whichever the case may be, or both. If the grower hauled his own turkeys in you wouldn't charge him for the hauling. If you hauled them in for him, you would charge him both for the hauling and dressing.

Q. Was that a per head basis?

A. The hauling and dressing was all on a per head basis.

He further testified (Tr. 122) that before the OPA regulations came in the charge for this service was 23c on hens and 25c on toms, and (Tr. 123) that this charge was raised to 25c and 28c per head. Mr. Norton further stated (Tr. 126) that under G-93 the per head charge came to as much as 72c per head on toms amounting to an average raise of 40c a head.

He further testified (Tr. 128) that since July, 1944, there was an embargo on turkeys so that all must go to the armed forces.

"There can't be a pound sold outside of that—their care; and that has been on, in fact, that order was on when this G-93 came into existence. We were compelled at that time to sell to the army and the growers were compelled to sell through a licensed dealer."

He further testified (Tr. 128):

"Since last May it has been in the shape it is now. The growers are simply holding back. They don't want to sell. In the meantime the war pool is right on our heads trying to get turkeys for our armed forces. If we are going to have to feed them overseas we have to get turkeys and since this order has been in effect, May 8th, there has been nothing but confusion among everyone, dealers and growers alike."

He said the same situation existed in the State of Washington. Mr. Norton stated (Tr. 181) that as to turkeys rejected by the Army a permit might be obtained for a resale and that the rejections might amount to about 1% of the turkeys handled. The court made the remark that this would come under the head of *de minimis non curat lex*.

Mr. Thad R. Perry testified (Tr. 206) that he was engaged in the same kind of business as Mr. Norton, as an independent dealer in Seattle, and that before

this order came out (Tr. 208) the charge was 30c to 35c per head for handling turkeys. He stated that just before the order in question became effective, he dressed tom turkeys that averaged 35 pounds and that if compelled to charge the grower according to the terms of this order, the amount would be \$1.05 per head instead of 35 cents. He said that he refused to comply with this order.

“We said that we did not wish to be a party to a confiscation of the farmer’s property.” (Tr. 209). This witness explained further the effect on the business and the resulting discrimination between the cooperatives and the independent dealers.

There was other testimony of other witnesses as to the unreasonableness of the order.

The Court regarded the Appellant’s application as a bill for discovery, and after hearing all the evidence in this and the companion case, concluded that a full disclosure had been made by the Appellees, that there remained nothing for the Appellant to discover, and dismissed the case.

SUMMARY OF ARGUMENT

In passing on the application for an Order to Show Cause why the Appellant should not be permitted to examine the books and records of the Appellees, the Court acted in a judicial capacity, not ministerially.

There was no legal basis for the application, since Order G-93, on which it was based, was illegal and void, and had been, in effect, annulled before the date of the hearing.

Assuming that a lawful basis for the application existed, such disclosures were made by the Appellees in the course of the hearing as to make unnecessary an inspection of their books and records, and thus the question before the Court became moot.

ARGUMENT

Appellant's Point I—The Function of the Court

The Appellant argues, in effect, that the Court had no judicial function to perform, and that when the application for the Order to Show Cause was presented it should have been granted without any investigation. At page 12 of the brief it is stated:

“The Act does not provide or even intimate that the Administrator’s right to inspect may be defeated by the testimony of a party as to any facts sought to be elicited by the inspection, or that the Administrator may be compelled to accept any such testimony in lieu of the inspection.”

That is tantamount to saying that no matter how fully detailed and complete a disclosure the Appellees might have made, still the order should have been granted under the plain provisions of the Act. This

seems to go beyond the requirements of the Act. Sec. 202 (a), quoted at pages 2 and 3 of the Appellant's brief, authorizes the Administrator "to obtain such information as he deems necessary or proper to assist him in prescribing any regulations or order under this Act, or in the administration or enforcement of this Act and regulations, orders, and price schedules thereunder." It is further argued on page 13 of the Appellant's brief that the rights of the Administrator in this matter of inspection are "as broad and free from limitation as language can make them," and that, "No substitute for this inspection is provided or contemplated by the Act." Again, at page 14, emphasis is placed on the provision to the effect that the Administrator may call for such information **as he deems necessary**; and, on the same page, the statement of the Court to the effect that it appeared to the Court that all the information required was disclosed is criticized as erroneous. Finally, on page 14, the argument is summarized in this sentence:

"Thus the Court concluded that it had the right to pass on both the character and quantum of the information sought by the Administrator and that it had the further right to impose on the Administrator the testimony of Appellees in lieu of the inspection of Appellees' original records and documents."

If the Court had no right to pass on the character and quantum of the evidence submitted, what was the province of the Court? The answer is, to act ministerially, only, as a cog in the chain of enforcement of the Act. The meaning of this contention of the Appellant is left in no doubt. The same idea is expressed over and over again in different language. At page 15 it is said that the Court had no authority to "determine what information must satisfy the Administrator. The information which Congress authorized the Administrator to secure was that which he deemed necessary and not that which the learned Court below deemed necessary."

An examination of the decisions cited and commented upon by the Appellant shows that they do not sustain his theory. In none of the cases is it held that the Court has no authority in the premises other than to determine constitutional questions, as suggested at page 17 of the brief. Reference is hereby made to a few of them as typical of all.

Walling v. Ralbal Corp.,

135 Fed. (2) 1003

This was a proceeding to compel obedience to a subpoena duces tecum. The Court said in the course of the opinion, "it is true, of course, that the data sought by a subpoena duces tecum must be relative to the inquiry at hand **and that the use of this power**

must at all times be closely confined to the rudimentary principles of justice.” It is said that the Act gives the Administrator an initial discretion in the issuance of a subpoena duces tecum, which, **if used soundly and properly** for the statutory purpose, will be upheld by the Courts and that a subpoena so issued will be enforced.

Bowles v. Glick Bros. Lumber Co.,
146 Fed (2d) 566

This was an action for a penalty. An investigation had been made and it was claimed that there had been an unlawful search and seizure. That was the only point under consideration. It was held that the Administrator did not act oppressively.

Bowles v. Insel,
148 Fed (2d) 91

Paragraph 1 of the syllabus of this case reads as follows:

“Generally, without a showing of probable cause to believe that the law has been violated and specific description of the papers and records to be produced, a subpoena requiring the production of private papers is violative of the provision against searches and seizures.”

That is all there is in the case, except that the records in question were held to be quasi-public records.

Martin Typewriter Co. v. Walling,
135 Fed. (2d) 918

This came up on a motion to dismiss on the ground that the Administrator was not authorized to act in the premises. The motion was denied and this was affirmed on appeal, because the Answer "did not put in issue the scope of the subject or the relevancy of the data therein described."

Mississippi Road Supply Co. v. Walling,
136 Fed. (2d) 391

In this case it is held that the issuance of an order upon refusal to obey a subpoena is not mandatory.

U. S. vs. Kauten,
133 Fed. (2d) 703

Here it appears that there was a full investigation by the Court.

It is submitted that Congress did not intend or attempt by the Act in question to deprive the Courts of the exercise of judicial power in dealing with such features of the enforcement of the Act as might be brought before them, and that no Court has so held, and that this becomes plain when the opinions are read as a whole and the nature of the cases observed, instead of wrenching portions of the opinions from the context. Indeed, in such a case, the application invokes the exercise of the judicial function, since the Appli-

cant seeks an Order to Show Cause why it should not be adjudged that the Respondents should permit the inspection. Under the construction of the Act urged by the Appellant relating to the duty of the Court, no such application should be made, it being enough for the Appellant to suggest to the Court that he had demanded the inspection, that it had been refused, and to present to the judge an order for him to sign on the dotted line commanding the respondents to permit the inspection. Thus a hearing becomes meaningless. Congress has gone pretty far toward delivering the American public into the power of numberless boards, bureaus, agencies and commissions, but not quite far enough, fortunately, to emasculate the Courts of the land altogether. Our Courts are still open and functioning in such matters as in others.

In view of the record in this case, the absurdity of reducing the Court to a purely clerical position in the practice of enforcing the Act and thus requiring the judge to issue an order commanding obedience to the demands of the Administrator becomes a glaring one.

The application was based solely on Order G-93 which was void.

On each and all of the grounds assigned by the Appellees: It violated the long established practice in the business. It discriminated between the independent operators and the cooperatives. It, in effect,

attempted to confiscate the property of the independent operators and to deprive them of their property without due process of law. On all these general grounds it was void. But aside from these, there remained the further fatal reason, namely: that it was issued without authority of law, without a legal basis, since the Price Control Act was designed to fix maximum prices, not minimum prices, and here a definite price was fixed. As to this there was no room for a misunderstanding, it being stated that the prices fixed in the order were the only prices which might be charged, the word "only" being emphasized in the text. The unfairness and absurdity resulting from an attempt to put such a provision in operation was clearly shown without dispute in the evidence submitted by the Appellees. As soon as the true character of the order became known to the main office in Washington it was nullified by the modification of October 2nd.

Miss Gallagher referred to injunctive relief. Obviously that could not be had, since the period from May 8th to August 14th had passed and the Appellees were not attempting to comply with the order, and at the time of the trial were operating under the modification. Therefore no purpose could be served under an order for the examination of the books and records of the Appellees, except possibly to uncover evidence which might be used as a basis for an action for a

penalty or for a criminal prosecution. In fact, Miss Gallagher frankly stated that the inspection was sought as a basis for **some kind** of a lawsuit against the Appellees.

Conceding for the sake of the argument the widest latitude to the powers vested in the Appellant in the enforcement of the Act, it must be admitted that by the record here no showing is made that a necessity existed for granting the application, even if it be argued that a sufficient disclosure was not made, since if he had a case against the Appellees the remedies afforded by the practice in an ordinary action for the recovery of a penalty or in a proceeding for the imposition of punishment were available to him. Elaboration on this point is not necessary. The Appellees having admitted non-compliance with the order, a complaint could be filed against them for the purpose of assessing penalties, and thereupon they could be subpoenaed duces tecum with all their records. Again, the Appellees having admitted violation of the order, an indictment or information could be predicated on that admission.

APPELLANTS POINT II—The sufficiency of the disclosure

At the trial of this and the companion case it developed, aside from the void character of the order, that if any reason for the application existed at the time of the initiation of the proceedings, it ceased to exist

during the course of the hearing, and thus the whole matter became moot and there was no longer anything before the Court. This was so because on the 2nd day of October, 1944 the obnoxious feature of the order was nullified by the head office of the OPA at Washington (according to the Court, as a result of the attack upon the order in this and the other case). The Appellants promptly complied with the order as modified. So there was no basis for an injunction. They admitted non-compliance from the beginning and until the date of the modification. Nevertheless, the Appellant's attorney stated that Appellant desired to obtain some sort of information as a basis for some sort of a lawsuit, that is, he asked for discovery. Discovery of what? Not of evidence bearing on the question of whether or not the Appellees had violated the order, because the violation was admitted. To ascertain the amount of sales by the Appellees during the period in question? No evidence on that score was needed, because it appeared without dispute that the Appellees had after May 8th, as before, sold all their merchandise to the Government for the use of the armed forces, which was, of course, a notorious transaction, all the features of which were open to the Applicant and doubtless well known to him. It will not do to say that because some of the turkeys were rejected by the Government therefore this order should be granted to ascertain to what

extent the Appellees had violated G-93 in dealing with such rejected portion, since the rejection amounted to only about 1% of the entire amount sold to the Government during the period in question, namely: **three months and six days**. The Court properly applied to that feature the maxim of *de minimis non curat lex*.

The Court adjudged that the case should be dismissed because a full disclosure had been made, and mentioned also the financial responsibility of the Appellees. While these were proper and sufficient grounds for the dismissal, a complete reason for the dismissal was the invalidity of the order. Referring to it once more: By its terms the independent operator was commanded, under the pains and penalties of the Act, to charge the grower an excessive and unreasonable amount for handling turkeys—up to \$1.05 per head! Of course the grower would not stand for any such imposition, especially when he could deal with a co-operative on a reasonable basis. Result, disappearance of the business of the independent operator. No wonder Mr. Norton said on the witness stand that it was unbelievable to him that such an order could possibly be issued requiring the operator to charge the grower a price in excess of what it cost him to handle the turkeys. Somebody had a brainstorm!

No legal right exists for the granting of the order applied for; no necessity exists for its issuance; no

public benefit could possibly accrue therefrom, while on the other hand the result would be expense and annoyance to the Appellees.

The judgment should be affirmed.

Respectfully submitted,

B. G. SKULASON,

Attorney for Appellees.





IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CHESTER BOWLES, Administrator, Office of
Price Administration, Appellant,
vs.

NORTHWEST POULTRY AND DAIRY PROD-
UCTS COMPANY, (an Oregon corporation),
and C. W. NORTON, President, Appellees.

Appellees' Petition For Rehearing

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Portland, Oregon.

To the Honorable Judges of said court, GARRECHT, DENMAN and HEALY:

Your petitioners, appellees herein, respectfully petition the court for a rehearing in said matter and for the dismissal of said proceedings upon the following grounds:

I.

The court is without jurisdiction in the premises.

II.

The proceeding before the court is not one authorized by the Emergency Price Control Act, or by any other law, or by any practice. It is not a suit or action. It is not due process of law. It is a nullity.

ARGUMENT.

The character of this proceeding was not adequately scrutinized by the appellees or their attorney, and the fact that no subpoena was issued or served on the appellees was not noticed by them, until after the decision in this court. This oversight is a matter of great regret. However, since the question of jurisdiction may be raised at any stage, it is taken for granted that the court will not, because of that oversight, refuse to consider this petition.

THE PROCEEDINGS.

1. The appellant filed in the court below an application for an order permitting inspection of records under Section 202 (b) of the Emergency Price Control Act, hereinafter referred to as the Act. (R. 340).

Section 202 (b) reads as follows:

“(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.”

Jurisdiction was claimed under Section 202 (e) of the Act, (R. 341) which reads as follows:

“(e) In case of contumacy by, or refusal to obey a subpoena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).”

Reference is made to Section 202 (a) of the Act (R. 341), whereby it is made unlawful for any person to sell or deliver any commodity, or otherwise to do or to omit to do, any act, in violation of any regulations or under Section 2, or of any regulation, or order or requirement under Section 202 (b).

Section 202 (a) reads as follows:

“SEC. 202. (a) The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.”

Section 205 (a) reads as follows:

“SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.”

2. Upon this application the appellant prayed for an order requiring the appellees to show cause why an

order should not issue requiring them to permit the inspection and copying of the records described in the Inspection Requirement mentioned at page 343 of the record.

A copy of the Inspection Requirement is attached to the application as Exhibit "A" (R. 344 and 345). This is a requirement to permit representatives of the Office of Price Administration to inspect the records of the appellees covering a certain period.

Exhibit "B" attached to the application is an affidavit to the effect that a request was made orally for permission to examine the records and that, this being refused, the "Inspection Requirement" was "served" on the appellees by a representative of the Office of Price Administration.

No subpoena was issued. No action or suit was instituted.

These sections of the Act, reduced to simple terms, prescribe:

(1) It is made unlawful for any person to violate any regulation, order or requirement thereof.

(2) The Administrator is authorized to make investigations and obtain information deemed by him necessary in the enforcement of the Act, and to require persons engaged in the business covered by the Act to keep records and permit inspection thereof.

(3) He may, by subpoena, require any person engaged in such business to appear in court to testify and produce documents.

(4) In case of refusal to obey a subpoena, an order of the court may issue on the application of the Administrator requiring such person to appear, give testimony and produce documents — a subpoena duces tecum.

(5) He is also authorized by Section 205 (a) to make application to the court for an order enforcing compliance with the provisions of the Act, by injunction or other order.

Construing these provisions together, showing of a violation of the Act and the issuance of a subpoena and disobedience thereof would seem to be jurisdictional prerequisites to the validity of any such order as was issued here.

The only thing that preceded the application was the "Inspection Requirement", which, as above noted, charged no violation of the Act and simply required permission to inspect and copy records, which it is said that the administrator believes would "constitute evidence which is competent, relevant and necessary in the said investigation * * * (R. 343).

Under the universal practice of the courts, such evidence is procurable by means of a subpoena in an appropriate suit or action. Nothing in the Act indicates that Congress attempted to depart from this practice, or to substitute for it a new procedure, except that the Administrator is authorized to issue a subpoena. Nothing in the Act confers jurisdiction on the court to enforce an "Inspection Requirement." That instrument is not a summons or a subpoena, and

yet on that alone is based the application in this case for an order permitting the inspection.

Such a procedure is not due process of law. From a legal point of view it is meaningless.

It seems clear that what Congress intended to legislate, was to authorize the Administrator to secure evidence in the time honored, constitutional manner, under a subpoena issued by the Administrator, or by the court in an appropriate suit or action wherein was charged a violation of the Act. This the Administrator is in effect authorized to do by subsections (b) and (c), which is to the effect that for the purpose of obtaining information he may by a subpoena, require the person in question to appear and testify and to produce documents. This would have been the proper step to take after refusal to comply with the "Inspection Requirement." Then, should the subpoena have been disobeyed, he could have applied to the court for an order requiring the person to appear and testify and produce documents or he could have filed suit and have obtained a subpoena from the court.

The steps to be taken, therefore, are:

(a) The issuance and delivery of a notice to permit inspection.

(b) The issuance of a subpoena for the inspection, or duces tecum.

(c) The issuance of application for, and the order commanding the recalcitrants to appear and testify.

The Administrator issued no subpoena, obtained no

subpena or order, but stood upon the notice alone, as if it were a complaint, a summons, or a subpena — a procedure unauthorized by any law and unknown to the practice of this or any other court.

The decision of the lower court should be affirmed and the proceedings ordered expunged from the records.

Respectfully submitted,

BARDI G. SKULASON,

Attorney for Petitioners,
1207 Public Service Bldg.,
Portland, Oregon.

I hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

BARDI G. SKULASON,
Attorney for Petitioners.



No. 11034

United States
Circuit Court of Appeals
For the Ninth Circuit.

A. N. McDONALD,

Appellant,

vs.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

JUN - 6 1945

PAUL P. O'BRIEN,
CLERK



No. 11034

United States
Circuit Court of Appeals
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A. N. McDONALD,

Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco, California.

Attorney for Defendant and Appellant.

MR. W. H. BRUNNER,

1355 Market Street,
San Francisco, California.

Attorney for Plaintiff and Appellee.

In the District Court of the United States
Northern District of California
Southern Division

No. 22746G

PRENTISS M. BROWN, Administrator, Office of
Price Administrator,

Plaintiff,

vs.

A. N. McDONALD and W. O. FINKE, individ-
ually and as co-partners, doing business under
the firm name of McDONALD & FINKE,
Defendants.

COMPLAINT FOR INJUNCTION AND
TREBLE DAMAGES

COUNT ONE

1. In the judgment of the Price Administrator, the defendants have engaged in actions and practices which constitute violations of Section 4(a) of the Emergency Price Control Act of 1942, (Pub. Law 421, 77th Cong., 2nd Sess., c. 56, 56 Stat. 23, 50 U.S.C.A., Appx. 212), hereinafter called "the Act," in that they violated Revised Maximum Price Regulation No. 169, as amended—Beef and Veal Carcasses and Wholesale Cuts; Revised Maximum Price Regulation No. 239, as amended—Lamb and Mutton Carcasses, and cuts at wholesale and retail; Revised Maximum Price [1*] Regulation No. 148, as amended—Dressed Hogs and Wholesale

*Page numbering appearing at foot of page of original certified Transcript of Record.

Pork Cuts; Maximum Price Regulation No. 389, as amended—Ceiling Prices for Certain Sausage Items at Wholesale, and Maximum Price Regulation No. 398—Variety Meats and Edible By-Products at Wholesale, all of which price regulations were effective in accordance with the provisions of said Act; and, therefore, pursuant to Section 205(a) of the Act, the Price Administrator brings this action to enforce compliance with said Section 4(a).

2. Jurisdiction of this action is conferred upon the Court by Section 205(c) of the Act.

3. At all times mentioned herein there has been in effect, pursuant to said Act, Revised Maximum Price Regulation No. 169, as amended (7 Fed. Reg. 10381), establishing maximum prices for beef and veal carcasses, wholesale and fabricated cuts, and processed products.

4. Since the 1st day of June, 1943, defendants sold at wholesale and delivered beef and veal carcasses, wholesale cuts, fabricated cuts and ground meat at prices in excess of those established by said Revised Maximum Price Regulation No. 169, as amended.

COUNT TWO

1. The allegations of paragraphs 1 and 2 of Count One herein are incorporated by reference as if fully set forth.

2. At all times mentioned herein there has been in effect, pursuant to said Act, Revised Maximum Price Regulation No. 239, as amended—Lamb and

Mutton Carcasses, and Cuts at Wholesale and Retail (7 Fed. Reg. 10688), establishing maximum prices of lamb and mutton carcasses, wholesale cuts and hotel supply cuts.

3. Since the 1st day of June, 1943, defendants sold at wholesale and delivered lamb and mutton carcasses, lamb and [2] mutton wholesale cuts, and lamb and mutton hotel supply cuts, at prices in excess of those established by Revised Maximum Price Regulation No. 239, as amended.

COUNT THREE

1. The allegations of Paragraphs 1 and 2 of Count One herein are incorporated by reference as if fully set forth.

2. At all times herein mentioned there has been in effect, pursuant to said Act, Revised Maximum Price Regulation No. 148, as amended (7 Fed. Reg. 8609)—Dressed Hogs and Wholesale Pork Cuts, establishing maximum prices of dressed hogs and wholesale pork cuts.

3. Since the 1st day of June, 1943, defendants sold at wholesale and delivered wholesale pork cuts at prices in excess of those established by said Revised Maximum Price Regulation No. 148, as amended.

COUNT FOUR

1. The allegations of Paragraphs 1 and 2 of Count One herein are incorporated by reference as if fully set forth.

2. At all times herein mentioned there has been

in effect, pursuant to said Act, Maximum Price Regulation No. 389, as amended—Ceiling prices for Certain Sausage Items at Wholesale, establishing maximum prices for pork or breakfast sausages, frankfurters and bologna. (8 Fed. Reg. 5903.)

3. Since the 1st day of June, 1943, defendants sold at wholesale and delivered pork or breakfast sausages, frankfurters and bologna, at prices in excess of those established by Maximum Price Regulation No. 389, as amended.

COUNT FIVE

1. The allegations of Paragraphs 1 and 2 of Count One herein are incorporated by reference as if fully set forth. [3]

2. At all times herein mentioned there has been in effect, pursuant to said Act, Maximum Price Regulation No. 398—Variety Meats and Edible By-Products at Wholesale (8 Fed. Reg. ———), effective June 1, 1943, establishing maximum prices of Fresh and Processed variety meats and edible by-products derived from hog, cattle, calf, sheep and lamb slaughter.

3. Since the 1st day of June, 1943, defendants sold at wholesale and delivered fresh variety meats and edible by-products, derived from hog, cattle, calf, sheep and lamb slaughter, at prices in excess of those established by Maximum Price Regulation No. 398.

COUNT SIX

1. The allegations of Paragraphs 1, 2 and 3 of Count One herein are incorporated by reference as if fully set forth.

2. During all times herein mentioned, Section 1364.407 (e) (2) of Revised Maximum Price Regulation No. 169, as amended, has provided that on or before June 15, 1943, each separate selling establishment making sales to purveyors of meals, pursuant to the provisions of Paragraph (o) of Section 1364.452 or Paragraph (n) of Section 1364.467 of said Regulation, shall file with the nearest District or State Office of the Office of Price Administration a statement showing:

“1. The total volume by weight, of all meats (fresh, frozen, cured, smoked, cooked, dried, canned, or otherwise processed), variety meats and edible by-products, sold and delivered by such selling establishment from September 15, 1942, through December 15, 1942, other than sales to war procurement agencies, and

“2. The total volume, by weight, of all kinds (eg., lamb, mutton, pork, beef, veal, sausage, ham-[4] burger, etc.) of meat, variety meats, (e.g., liver, tongue, kidney, etc.), and edible by-products, and all other processed meat items not specifically set forth herein, sold and delivered by such selling establishment, during such period, to purveyors of meals, other than war procurement agencies.”

3. At all times herein mentioned, defendants made sales of meat to purveyors of meals, pursuant to the provisions of Paragraph (o) of Section

1364.452 and Paragraph (n) of Section 1364.467 of said Regulation, but failed to file on or before June 15, 1943, with the Office of Price Administration the statement set forth in said Paragraph 1364.407(e) (2) of said Regulation.

4. At all times herein mentioned, Section 1364.407(e) (1) has provided, in substance, that every separate selling establishment making sales to purveyors of meals shall keep for inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, is in effect, a complete and accurate record in schedule form for each calendar month, commencing with January, 1943, with respect to beef, and June 1, 1943, with respect to veal, showing separately:

“1. The total inventory in pounds at the beginning of each month of each grade of each beef carcass, beef wholesale cut, fabricated beef cut, beef offal item and beef by-product (bones, fat, tallow, waste, etc.); veal carcass, veal wholesale cut, fabricated veal cut, veal offal item and veal by-product (bones, fat, tallow, waste, etc.); the total additions to inventory in pounds during the month for each grade of each [5] such item; and the total inventory in pounds at the end of each month for each grade of each such item;

“2. The total sales in pounds during the month of each grade of beef carcass, beef wholesale cut, fabricated cut, beef offal item, and beef by-product (bones, fat, tallow, waste, etc.); veal carcass, veal wholesale cut, fabricated veal cut, veal offal item,

and veal by-product (bones, fat, tallow, waste, etc.), showing separately the sales in pounds of each grade of each item made to purveyors of meals, war procurement agencies and other government agencies and the sales in pounds made to other buyers;

“3. The total sales realization for each item separately enumerated in (2) hereof (all sales of kosher meat shall be shown separately.)”

5. At all times mentioned herein, defendants made sales of beef and veal carcasses, wholesale cuts, fabricated cuts and processed products, to purveyors of meals and failed to make and keep for inspection by the Office of Price Administration complete and accurate records showing the data required to be kept by said Section 1364.407 (e) (1) of said Regulation.

6. At all times herein mentioned Section 1364.407(f) of Revised Maximum Price Regulation No. 169, as amended, provided as follows:

“Every person making a sale of any beef carcass, beef wholesale cut, veal carcass, veal wholesale cut, processed product or other meat item, subject to this Revised Regulation, shall furnish to the purchaser at the time of delivery a written statement setting forth the name and address of the buyer and seller; identifying each such item sold; and setting forth the quantity, the grade, including sex identification as to [6] cow, stag, bull, and the weight thereof, and the price charged and received therefor, including a separate statement

of the transportation and local delivery charge, as required by Section 1364.454(a)(6).

7. At all times herein mentioned, defendants made wholesale sales of said meat items described in paragraph 6 hereof and failed to furnish to the purchasers of said meat items at the time of delivery, a written statement setting forth the data required by Section 1364.407(f) of said Regulation.

COUNT SEVEN

1. Plaintiff, as administrator, Office of Price Administration, brings this action for treble damages on behalf of the United States, pursuant to the provisions of Section 205(e) of the Emergency Price Control Act of 1942 (Pub. Law 421, 77th Cong. 2d Sess., c. 26, 56 Stat. 23), enacted January 30, 1942, hereinafter called "the Act."

2. Jurisdiction of this Count is conferred upon this Court by Sections 205(c) and 205(e) of the Act.

3. At all times herein mentioned there has been in full force and effect, pursuant to the Act, Revised Maximum Price Regulations No. 169, 239 and 148, all as amended, Maximum Price Regulation No. 389, as amended, and Maximum Price Regulation No. 398.

4. Between the 1st day of June, 1943, and the 3rd day of July, 1943, defendants sold at wholesale, and delivered, beef and veal carcasses, wholesale cuts, fabricated cuts, ground meat and processed products, at prices in excess of those established

by Revised Maximum Price Regulation No. 169, as amended. [7]

Between the 1st day of June, 1943, and the 3rd day of July, 1943, defendants sold at wholesale, and delivered lamb and mutton carcasses, wholesale cuts and hotel supply cuts, at prices in excess of the maximum prices established by Revised Maximum Price Regulation No. 239, as amended.

Between the 1st day of June, 1943, and the 3rd day of July, 1943, defendants sold at wholesale, and delivered, wholesale pork cuts at prices exceeding the maximum prices established by Revised Maximum Price Regulation No. 148, as amended.

Between the 1st day of June, 1943, and the 3rd day of July, 1943, defendants sold at wholesale, and delivered certain sausage items at prices exceeding the maximum prices established by Maximum Price Regulation No. 389, as amended.

Between the 1st day of June, 1943, and the 3rd day of July, 1943, defendants sold at wholesale, and delivered, fresh variety meats and edible by-products derived from hog, cattle, calf, sheep and lamb slaughter, at prices exceeding the maximum prices established by Maximum Price Regulation No. 398.

5. Said transactions referred to in Paragraph 4 of this Count occurred more than six months after the date of approval and enactment of the Act. None of said purchases was made for use or consumption other than in the course of trade or business.

6. Three times the aggregate amount by which the prices received by the defendants in the transactions referred to in Paragraph 4 of this Count

exceed the maximum prices provided by said Regulations equals \$12,804.66.

Wherefore, the Administrator demands:

1. A preliminary and final injunction enjoining the [8] defendants, their officers, agents, servants, employees and attorneys, and all persons in active concert or participation with the defendants, from:

Directly or indirectly selling, delivering, or offering for sale or delivery, any beef, veal lamb, mutton, or pork carcasses, wholesale cuts, fabricated cuts, hotel supply cuts, processed products, ground meat, pork or breakfast sausages, frankfurters, bologna, or fresh variety meats and edible by-products derived from hog, cattle, calf, sheep and lamb slaughter, at prices in excess of those established by Revised Maximum Price Regulations No. 169, 239 and 148, all as amended; Maximum Price Regulation No. 389, as amended, and Maximum Price Regulation No. 398, or otherwise violating, or attempting or agreeing to do anything in violation of said Regulations, or in violation of any Regulation or Order adopted pursuant to the Emergency Price Control Act of 1942 establishing maximum prices for any of said meat items.

2. A preliminary and final injunction requiring and directing the defendants, their officers, agents, servants, employees and attorneys, and all persons in active concert or participation with the defendants, to:

File with the Office of Price Administration a statement setting forth the data required by Section 1364.407(e) of Revised Maximum Price Regulation No. 169, as amended,

and

Make and keep for inspection by the Office of Price Administration, complete and accurate [9] records showing the data required by Section 1364.407(e)(1) of said Regulation,

and

To furnish to the purchasers of meat items from said defendants, a written statement at the time of delivery, setting forth the data required by Section 1364.407(f) of said Revised Maximum Price Regulation No. 169.

3. An appropriate temporary restraining order restraining, until the determination of the Price Administrator's motion for a preliminary injunction herein, the defendants, their officers, agents, servants, employees and attorneys, and all persons in active concert or participation with the defendants, from:

Engaging in the acts and practices set forth in Demand 1 above; and

a temporary mandatory order requiring said persons to:

Do all the acts specified in Demand 2 above.

4. Judgment on behalf of the United States against defendants in the sum of \$12,804.66.

5. Such other further and different relief as to the Court may seem just and proper in the premises.

Dated at San Francisco, California, August 23rd, 1943.

JOSEPH F. RANKIN

GEORGE MONCHARSH

THOS. C. RYAN

Attorneys for Plaintiff

[Endorsed]: Filed Aug. 23, 1943. [10]

[Title of District Court and Cause.]

MOTION FOR MORE DEFINITE AND
CERTAIN COMPLAINT

The defendant, A. N. McDonald, moves the court to require the plaintiff to furnish him with a more definite and certain complaint herein so that:

Each count of the complaint may show the time, quality, quantity, purchaser, price paid, alleged maximum price, and particular alleged regulation violated as to any sale charged against this defendant,

To the end that this defendant may properly and intelligently prepare a responsive pleading herein.

CHARLES REAGH,

Attorney for A. N. McDonald.

(Acknowledgment of Receipt of Copy)

[Endorsed]: Filed Sep. 23, 1943. [11]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT A. N. McDONALD

For answer said defendant says:

First Defense.

The complaint fails to state a claim against this defendant upon which relief can be granted.

Second Defense.

This defendant admits the allegations contained in paragraph 2 of the first count of the complaint, alleges that he is without knowledge or information sufficient to form a belief as to the allegations of paragraph 1 of the first count of the complaint; and denies each and every other allegation contained in the complaint.

CHARLES REAGH

Attorney for A. N. McDonald

Service admitted overleaf.

(Acknowledgment of Receipt of Service)

[Endorsed]: Filed Oct. 25, 1943. [12]

[Title of District Court and Cause.]

DEMAND FOR JURY TRIAL

Defendant A. N. McDonald demands trial by jury as to all issues herein.

CHARLES REAGH

Attorney for A. N. McDonald

Received a copy of the within Demand for Jury Trial, this 25th day of October, 1943.

THOS. C. RYAN

Attorney for Plaintiff

CHARLES REAGH

Attorney for W. O. Finke

[Endorsed]: Filed Oct. 25, 1943. [13]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This cause came on for pre-trial conference before the Honorable Louis E. Goodman, District Judge, on Monday, April 3, 1944, W. H. Brunner, Esq., appearing as attorney for the plaintiff, and Charles Reagh, Esq., appearing as attorney for defendants.

Based upon proceedings at said pre-trial conference It Is Ordered As Follows:

1. The defendant W. O. Finke is not now a partner of the defendant A. N. McDonald, nor was he such a partner during any of the times mentioned in the complaint in the above entitled action. That said W. O. Finke was and now is only an employee of said A. N. McDonald and has no interest whatever in the wholesale and retail business conducted by said A. N. McDonald [14] in the City of Oakland, County of Alameda, State of California, under the firm name and style of McDonald's Market. That for the foregoing reason this action be and the same is hereby dismissed as to the defendant W. O. Finke.

2. That defendant A. N. McDonald operates a

meat market at 493-497 Ninth Street, in the City of Oakland, County of Alameda, State of California, from which he sells meat primarily at wholesale to purveyors of meals and to retailers, and incidentally at retail to ultimate consumers who buy for home consumption and use. That at no time covered by the complaint on file in this action did defendant make sales at retail to ultimate consumers amounting to more than 15 per cent of his total monthly business.

3. That plaintiff deliver to defendant or his counsel for critical examination the transcript prepared by investigators of the Office of Price Administration from the invoices and records of said defendant A. N. McDonald for the period of June 1, 1943, to July 3, 1943 inclusive, which transcript shows not only the facts appearing upon the face of said invoices but also a listing of the proper ceiling price applicable to each sale and the determination of the overcharge alleged with reference to each sale. That defendant, after such critical examination of said transcript, indicate in writing to plaintiff by specifications of objection the particulars wherein he claims that such transcript does not state the true facts applying to each sale, or the proper maximum price at which each sale exceeds the maximum lawful price which defendant could have charged in making such sale. That if no objection be made or specifications of objection be furnished by defendant as hereinabove permitted, it be considered by this Court for the purposes of this action [15] that each item set forth in said tran-

script is true, accurate and correct as to the description of said item sold, the price charged, the applicable lawful maximum price, and the amount of overcharge, if any. That if objection be made and specifications of objection be furnished by defendant, and not be reconciled by agreement between the parties hereto, the issues so joined by such objection and specifications of objection be tendered for determination at the trial of said action.

4. That issues in said action be limited as hereinabove set forth and as so limited that this Pre-Trial Order and the objections and specifications of objection as permitted hereunder be considered a complete statement of all matters in dispute between the parties to this action. That this Pre-Trial Order shall not be amended except with the consent of the parties or at the discretion of the Court to prevent manifest injustice in accordance with Rule 16 of the Federal Rules of Civil Procedure.

Dated this 11th day of April, 1944.

LOUIS E. GOODMAN

United States District Judge

Receipt of a copy of the within Pre-Trial Order is hereby admitted this 8th day of April, 1944.

CHARLES REAGH

Attorney for Defendant.

Please note defendant's exception

CHARLES REAGH

Attorney for A. N. McDonald

[Endorsed]: Filed Apr. 11, 1944. [16]

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of four thousand six hundred thirty-four dollars and seven cents (\$4634.07/100) Dollars.

GRACE McCANN MORLEY

Foreman.

[Endorsed]: Filed August 23, 1944. [17]

[Title of District Court and Cause.]

DEFENDANT'S MOTION FOR JUDGMENT NON OBSTANTE VERDICTO

The defendant respectfully moves the court to have the verdict and any judgment entered thereon in this case set aside and to have judgment entered for defendant in accordance with the motion for a directed verdict made at the close of the plaintiff's evidence and renewed at the close of all the evidence in this case. The grounds of such motion are that there is a total failure of proof in this case and no evidence upon which a verdict in favor of plaintiff and against defendant can be legally based, in the particulars set forth at the time of making such motions.

Dated: San Francisco, California, August 31st,
A. D. 1944.

CHARLES REAGH

Attorney for Defendant

Receipt of copy of the above motion acknowledged this 31st day of August, A. D. 1944.

THOMAS C. RYAN

W. H. BRUNNER

Attorneys for Plaintiff

[Endorsed]: Filed Aug. 31, 1944. [18]

In the Southern Division of the United States District Court for the Northern District of California

No. 22746-G

CHESTER BOWLES, Administrator, Office of Price Administration,

Plaintiff,

vs.

A. N. McDONALD, etc.,

Defendant.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on August 22, 1944, being a day in the July 1944 Term of said Court, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; W. H. Brunner, Esq. appearing at attorney for the plaintiff, and Charles Reagh, Esq. appearing at attorney for the defendant, and the trial having been proceeded with on the 22nd and 23rd days of August in said year and term, and

oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, viz: "We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of four thousand six hundred thirty-four dollars and seven cents (\$4634.07). Grace McCann Morley, Foreman," and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs; [19]

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiff do have and recover of and from said defendant the sum of Four Thousand Six Hundred Thirty-four and 07/100 Dollars (\$4,634.07), together with his costs herein expended taxed at \$.

Judgment entered this 5th day of September, 1944.

C. W. CALBREATH,
Clerk

[Endorsed]: Filed Sep. 5, 1944. [20]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled action came on regularly for trial on the 22nd and 23rd days of August, 1944 before the Honorable Louis E. Goodman, Judge of the United States District Court, on the issue of an injunction, and before a jury on the issue of treble damages.

Plaintiff was represented by W. H. Brunner, Esq. and defendant by Charles Reagh, Esq. Evidence both oral and documentary was offered on behalf of both parties, and the issue of an injunction having been submitted to the Court, the Court hereby finds as follows:

FINDINGS OF FACT

1. That all the matters, facts and things alleged and set forth in Counts One, Two, Three, Four and Five of plaintiff's [21] complaint are and each of them is true.

2. As to Count Six of plaintiff's complaint, the Court finds:

(a) That there was no evidence to prove the allegations of Paragraphs 2, 3 and 4 of said Count Six.

(b) That all the matters, facts and things alleged and set forth in Paragraphs 1, 5, 6 and 7 of said Count Six are and each of them is true.

CONCLUSION OF LAW

As conclusions of law from the foregoing findings of fact, the Court concludes that plaintiff is entitled to a permanent injunction enjoining the defendant, his officers, agents, servants, employees and attorneys, and all persons in active concert or participation with him, from:

Directly or indirectly selling, delivering or offering for sale or delivery, any beef, veal, lamb, mutton, or pork carcasses, wholesale cuts, fabricated cuts, hotel supply cuts, processed products, ground meat, pork or breakfast sausages, frankfurters, bologna, or fresh variety meats and edible by-products derived from hog, cattle, calf, sheep and lamb slaughter, at prices in excess of those established by Revised Maximum Price Regulations No. 169, 239 and 148, all as amended; Maximum Price Regulation No. 389, as amended, and Maximum Price Regulation No. 398, or otherwise violating, or attempting or agreeing to do anything in violation of said Regulations, or in violation of any Regulation or Order adopted pursuant to the [22] Emergency Price Control Act of 1942, as amended, establishing maximum prices for any of said meat items.

2. A permanent injunction requiring and directing the defendant, his officers, agents, servants, employees and attorneys, and all persons in active concert or participation with the defendant, to:

Make and keep for inspection by the Office of Price Administration, complete and accurate records showing the data required by Section 1364.-407(e)(1) of said Regulation.

and

To furnish to the purchasers of meat items from said defendants, a written statement at the time of delivery, setting forth the data required by Section 1364.407(f) of said Revised Maximum Price Regulation No. 169.

3. That plaintiff have judgment for costs. Let judgment be entered accordingly.

Dated: September 8th, 1944.

LOUIS E. GOODMAN

Judge of the United States
District Court.

Receipt of a copy of the within Finding of Fact and Conclusions of Law is hereby acknowledged this 2nd day of Sept., 1944.

CHARLES REAGH

Attorney for Defendant.

[Endorsed]: Filed Sep. 8, 1944. [23]

In the District Court of the United States, Northern
District of California, Southern Division

No. 22746-G

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

A. N. McDONALD,

Defendant.

JUDGMENT FOR PERMANENT
INJUNCTION

The above entitled action came on regularly for trial on the 22nd and 23rd days of August, 1944 before the Honorable Louis E. Goodman, Judge of the United States District Court, on the issue of an injunction, and before a jury on the issue of treble damages.

Plaintiff was represented by W. H. Brunner, Esq. and defendant by Charles Reagh, Esq. Evidence both oral and documentary was offered on behalf of both parties, and the Court having filed herein its Findings of Fact and Conclusions of Law, it is hereby

Ordered, Adjudged and Decreed:

1. That plaintiff is entitled to a permanent injunction enjoining the defendant, his officers, agents, servants, [24] employees and attorneys, and all persons in active concert or participation with him, from:

Directly or indirectly selling, delivering, or offering for sale or delivery, any beef, veal, lamb, mutton, or pork carcasses, wholesale cuts, fabricated cuts, hotel supply cuts, processed products, ground meat, pork or breakfast sausages, frankfurters, bologna, or fresh variety meats and edible by-products derived from hog, cattle, calf, sheep and lamb slaughter, at prices in excess of those established by Revised Maximum Price Regulations Nos. 169, 239 and 148, all as amended; Maximum Price Regulation No. 389, as amended, and Maximum Price Regulation No. 398, or otherwise violating, or attempting or agreeing to do anything in violation of said regulations, or in violation of any regulation or order adopted pursuant to the Emergency Price Control Act of 1942, as amended, establishing maximum prices for any of said meat items.

2. That the defendant, his officers, agents, servants, employees and attorneys, and all persons in active concert or participation with the defendant, are permanently required and directed to:

Make and keep for inspection by the Office of Price Administration, complete and accurate records showing the data required by Section 1364.407(e)(1) of Revised Maximum Price Regulation No. 169, as amended, and

To furnish to the purchasers of meat items [25] from said defendants, a written statement at the time of delivery, setting forth the data required by Section 1364.407(f) of said Regulation.

3. That plaintiff have judgment against the defendant for his costs.

Dated: Sept. 8th, 1944.

LOUIS E. GOODMAN

Judge of the United States
District Court

[Endorsed]: Filed Sep. 8, 1944. [26]

[Title of District Court and Cause.]

DEFENDANT'S MOTION FOR NEW TRIAL

Defendant moves the court to set aside the verdict and judgment herein and grant a new trial of this case because:

1. The verdict is against the evidence, in that there was no competent evidence to support it.
2. The verdict is against the law.
3. At the trial the court erred in matters of law, that is to say: [27]

(a) In admitting evidence against the objection of defendant, particularly in admitting in evidence Exhibit No. 1, offered by the plaintiff

(b) In over-ruling the defendant's motion for a directed verdict at the close of the plaintiff's case and his like motion at the close of all the evidence

(c) In instructing the jury in that the charge as a whole was misleading and in particular was erroneous in those matters to which specific exceptions were taken by defendant at the close of the charge.

(d) In refusing the instructions requested by the defendant

4. Because by the pre-trial order herein, the defendant was prevented from having a fair trial in that thereby he was required to furnish *evidence* which might be made the basis of a criminal charge against him, or to admit facts which might expose him to a penalty or forfeiture, the defendant now again claiming that said pre-trial order was and is an infringement of his right against self incrimination.

5. The judgment is erroneous in all the particulars above claimed to be erroneous in the verdict.

Dated: September 15th, 1944.

CHARLES REAGH

Attorney for Defendant

Received a copy of the above and foregoing Motion for New Trial, this 15th day of September, 1944.

THOMAS C. RYAN

W. H. BRUNNER

Attorneys for Plaintiff

[Endorsed]: Filed Sep. 15, 1944. [28]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To C. W. Calbreath, Esq., Clerk of said United States District Court, please take notice:

That the above named A. N. McDonald hereby appeals from the final judgment of this Court, entered of record on the 5th day of September, 1944, to the United States Circuit Court of Appeals for the 9th Circuit.

Dated: December 15th, 1944.

CHARLES REAGH

Attorney for Defendant

[Endorsed]: Filed Dec. 15, 1944. [29]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellant, A. N. McDonald, designates the following portion of the record, proceedings and evidence in this cause to be contained in the record on appeal, to-wit:

1. All the documents contained in the files of the clerk of this court.
2. All the evidence and proceedings, including instructions and exceptions thereto, at the trial of this cause. [30]
3. All the exhibits received in evidence at the trial of said cause.

It is the intention of the appellant on this appeal to rely upon the complete record and all the proceedings and evidence in this action.

Dated: December 15th, 1944.

CHARLES REAGH

Attorney for Defendant

Receipt of a copy of the above and foregoing Designation of Contents of Record on Appeal is hereby acknowledged this 15th day of December, 1944.

W. H. BRUNNER

PHILIP ADAMS

Attorneys for Plaintiff

[Endorsed]: Filed Dec. 15, 1944. [31]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant may have to and including March 5, 1945, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: January 24, 1945.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed Jan. 24, 1945. [32]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause being shown, the time of the appellant dered that the Appellant herein may have to and including March 15, 1945, to file the Record on Appeal in the United States Circuit Court of Appeal in and for the Ninth Circuit.

Dated: March 5, 1945.

LOUIS E. GOODMAN

United States District Judge.

[Endorsed]: Filed Mar. 5, 1945. [33]

In the Circuit Court of Appeals of the United
States for the Ninth Circuit

CHESTER BOWLES, as Administrator, etc.,
Plaintiff and Appellee,

v.

A. N. McDONALD, et al,

Defendants,

A. N. McDONALD,

Appellant.

ORDER ENLARGING TIME TO LODGE
RECORD

Good cause being shown, the time of the apellant herein to file in this court the transcript of record on appeal is hereby enlarged to and including the 14th day of April, 1945.

Dated: March 15th, 1945.

FRANCIS A. GARRECHT

Circuit Judge

[Endorsed]: Filed Mar. 15, 1945. Paul P. O'Brien, Clerk.

[Endorsed]: Filed Mar. 15, 1945. C. W. Calbreath, Clerk. [34]

In the District Court of the United States for
the Northern District of California, Southern
Division.

No. 22746-G

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

v.

A. N. McDONALD,

Defendant.

ORDER THAT CERTAIN DOCUMENTS BE
ATTACHED TO RECORD AND TRAN-
SCRIPT ON APPEAL AND ORIGINALS
TRANSMITTED

On the motion of Charles Reagh, Esq., in open
court, good cause appearing, it is

Ordered: That in preparing the record on appeal
herein, the Clerk of this Court attach thereto the
original of the Reporter's Transcript of the oral
proceedings and also Exhibit No. 1.

Dated: March 19th, 1945.

LOUIS E. GOODMAN

District Judge

[Endorsed]: Filed Mar. 19, 1945. [35]

District Court of the United States,
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 35 pages, numbered from 1 to 35, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Prentiss M. Brown, Administrator, Office of Price Administrator, Plaintiff, vs. A. N. McDonald and W. O. Finke, individually and as co-partners, doing business under the firm name of McDonald & Finke, Defendants, No. 22746 G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$10.85 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at

San Francisco, California, this 2nd day of April,
A. D. 1945.

[Seal]

C. W. CALBREATH,

Clerk

M. E. VAN BUREN

Deputy Clerk [36]

In the Southern Division of the United States
District Court, in and for the Northern Dis-
trict of California.

No. 22746-G

Before: Hon. Louis E. Goodman,
Judge.

CHESTER BOWLES, Administrator, Office Price
Administration,

Plaintiff,

v.

A. N. McDONALD and W. O. FINKE, individu-
ally and as copartners doing business under
the name of McDONALD & FINKE,

Defendants.

Tuesday, August 22, 1944

Counsel Appearing:

W. H. Brunner, Esq.,
For Plaintiff

Charles Reagh, Esq.,
For Defendants

(A jury having been impaneled and opening

statements made by counsel for plaintiff and defendants and following proceedings were had:) [1*]

OLLIS W. NEWMAN,

called for the plaintiff; sworn.

The Clerk: Will you state your name to the Court and jury, please.

A. Ollis W. Newman.

Mr. Brunner: Q. What is your business or occupation, Mr. Newman?

A. I am with Safeway Stores.

Q. How long have you been with Safeway Stores? A. Just a year.

Q. Where were you employed prior to the time that you worked for the Safeway Stores?

A. Office of Price Administration.

Q. In what capacity A. Investigator.

Q. I will ask you, Mr. Newman, whether in your capacity as investigator of the Office of Price Administration, you had occasion to examine the records of Mr. McDonald, or what was then known as McDonald & Finke? A. I did.

Q. What records did you examine?

A. As near as we could determine, all of the available sales for the month of June.

Q. What year? A. 1943.

Q. What, if anything, did you do with reference to the sales records in the way of transcribing them onto a record for the purpose of investigation?

*Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of Ollis W. Newman.)

A. We received a copy of the sales record——

Q. From where?

A. From the bookkeeper of McDonald & Finke, as it was then called, and gave a receipt for them and brought them to the office and made, as near as possible, an absolute transcription. [2]

Q. I show you here, Mr. Newman, a document of many pages, 158 pages, and I ask you if these yellow sheets are the transcript you made.

A. They are.

The Court: That is Plaintiff's Exhibit 1 for identification.

(The document was marked Plaintiff's Exhibit 1 for identification.)

Mr. Brunner: Q. Was this made by you or under your direction?

A. Some of it is in my handwriting.

Q. All of it is not in your handwriting?

A. It was made under my direction.

Q. Did you check the prices that appear on this transcript? A. Yes.

Q. That is as to the sales ceiling prices.

A. Yes.

Q. Specified in this transcript, Plaintiff's Exhibit 1 for identification are true, accurate and correct?

Mr. Reagh: I object to that. The Court takes judicial notice of the regulations. The Court may refresh its recollection as to what the ceiling prices were, but it is not for the witness to testify.

(Testimony of Ollis W. Newman.)

The Court: Is there any question that these prices in the schedule as listed were the ceiling prices?

Mr. Reagh: I have no way of telling.

The Court: This record was submitted to you.

Mr. Reagh: I still have no way of telling, it is impossible for me to check these prices. Mr. McDonald was ill at the time [3] that was done and I had no time to check it. I am not going to be technical about any question of the ceiling price, I will say that to the court, and Mr. Brunner. I am not going to waste any time, but I do not want them to be proved in this way. May I elaborate my objection for the record?

The Court: Yes.

Mr. Reagh: Objected to as immaterial, irrelevant, and incompetent, not the best evidence, the witness being asked to testify to matters that the Court will take judicial notice of, calling for an opinion and conclusion of the witness upon the very matter to be submitted to the Court.

The Court: The objection is overruled.

Mr. Reagh: Exception.

A. Yes.

Mr. Brunner: I offer now, if your Honor please, the transcript, which is marked Plaintiff's Exhibit 1 for identification, in evidence.

Mr. Reagh: In this matter, your Honor, as to the portion of the document regarding the ceiling price I take it that is already covered by your Honor's ruling, and I renew by objection to that.

(Testimony of Ollis W. Newman.)

As to the transcript of the transaction involved, I object on behalf of the defendant as immaterial, irrelevant, and incompetent, not the best evidence, no proper foundation having been laid, calling for an opinion and conclusion of the witness on the precise matter in controversy, and as to the [4] duty of the defendant in the pre-trial order to have studied and set forth any discrepancies, I object on the ground that the pre-trial order calls upon the defendant to violate his privilege under the bill of rights, in that the matters and things charged in the complaint could have been made and now are the subject of a criminal prosecution under section 4. I further object on the ground that the defendant was called upon to expose himself to penal punishment by the demand made upon him, under penalty of having made an admission in pointing out anything in this transcript to which he objected. It is improper practice to demand of defendant under penalty of being guilty of an admission that he pointed out particular items and be deemed to have admitted all of the rest——

The Court: I do not want to interrupt you, but you are arguing the matter.

Mr. Reagh: I am trying to save time, I am trying to state my grounds of objection only.

The Court: I do not understand that this transcript is being offered as an admission. Unless I am incorrect the witness testified that this is a correct copy of the records that were furnished him by the defendant. The witness' testimony is that

(Testimony of Ollis W. Newman.)

it is correct as to the ceiling prices from the data which was assembled from the record of the defendant. Is that correct? A. Yes.

The Court: Is there anything you wish to add to your ob- [5] jection?

Mr. Reagh: If your Honor please, I have sufficiently stated my grounds of objection; that is all.

The Court: That is up to you. You can state any grounds you wish.

Mr. Reagh: The defendant through his counsel specifically sets up a claim to immunity under the Bill of Rights for being required to furnish testimony against himself, and under the necessity at free trial conference of indicating objections or being deemed to admit all else contained in it.

The Court: Inasmuch as there is no question of procedure involved I do not think that there is anything to the objection. It is overruled. The exhibit may be admitted in evidence.

(Plaintiff's Exhibit 1 For Identification was thereupon admitted in evidence.)

Mr. Brunner: That is all.

Cross-Examination

Mr. Reagh: Q. The only record you saw was the sales tags, was it not? A. Yes.

Q. That is all you saw, was it not?

A. Yes.

Mr. Reagh: That is all.

The Court: Anything further with this witness?

Mr. Brunner: No, your Honor. I will call Mr. Larney. [6]

ALBERT L. LEARNEY,

called as a witness by Plaintiff; sworn.

The Clerk: Will you state your name to the Court and jury, please?

A. Albert L. Learney.

Mr. Brunner: Q. What is your business or occupation, Mr. Learney?

A. Price specialist, Office of Price Administration.

Q. As price specialist in the Office of Price Administration, what are your duties?

A. To make available to anyone rules and regulations covered by OPA laws.

Q. I will ask you whether or not that includes regulations of the Office of Price Administration?

A. Yes, it includes the regulations of the Office of Price Administration.

Q. Is there any particular field of those regulations in which you specialize?

A. At that time in meat.

Q. At that time in meat? A. Yes.

Q. How long have you been with the Office of Price Administration?

A. Since March 12, 1943.

Q. Do you know A. N. McDonald?

A. I have met Mr. McDonald.

Q. Did you ever meet Mrs. McDonald, who is sitting behind Mr. Reagh?

A. I do not believe so, I do not remember.

Q. Have you ever met Mr. Finke?

A. I do not believe so.

(Testimony of Albert L. Learney.)

Q. To your knowledge, has any request been made of you or the Office of Price Administration for information concerning price regulations by either Mr. McDonald, Mr. Finke, or Mrs. McDonald, prior to the 1st of June, 1943?

A. I cannot state the date. [7] If I may explain, the first request was by the bookkeeper, I believe, just about the time Mr. McDonald returned from the East.

Mr. Brunner: July 4, will you stipulate to that?

Mr. Reagh: July 9, if you want the stipulation.

Mr. Brunner: We will put it on that basis; this witness spoke to Mr. McDonald after he returned from the East, whatever time that was.

Mr. Reagh: July 9th.

Mr. Brunner: Q. In your capacity as price specialist, what are your duties with respect to being familiar with prices which are provided in the regulations for meat?

A. I interpret the regulations as to price and as they apply to a particular business.

Q. By that do you mean that you are given the facts applying to a particular situation, and from those facts which are given to you determine the proper price?

A. That is right.

Q. How does an individual who comes under price regulation obtain the advice and information which you are prepared to give?

(Testimony of Albert L. Learney.)

A. By either applying for it or coming to the office and soliciting our advice in the matter.

Q. Do you give information on the telephone?

A. Yes.

Q. Do you give information by letter?

A. Yes.

Q. Will you state how much of your time is given to that particular function and duty of giving information on the request [8] of individuals who seek knowledge of how to conduct their business under the regulations?

A. I would say about 90 per cent of my time.

Q. On meat at the time in question, last year in June or July, or thereabouts, were there any others besides yourself giving information from the Office of Price Administration, if you know, on the applicability of regulations?

A. The Food Section Control.

Q. In the Food Section of the Office of Price Administration, the price staff is composed of how many persons, or was composed of how many persons in June and July. A. Six persons.

Q. Consisting of whom?

A. A commodity specialist specializing in different commodities, such as meat, groceries, dairy productions, etc.

Q. Will you state whether or not they have a legal adviser to advise them and the public in connection with that particular work?

A. Each commodity section or each department of the Food Section has its Food Section Attorney

(Testimony of Albert L. Learney.)

and in turn they have the District Office Attorney in case the Food Section Attorney happens not to be there.

Q. Will you state whether or not the advice of that attorney is available to the public or was available to the public on request in May, June and July of 1943?

A. It was available.

Q. I show you here, Mr. Learney, Plaintiff's Exhibit 1 in Evidence, consisting of a transcript of certain dealings of the [9] McDonald firm for the period providing mostly the month of June, 1943, and I will ask you if you have seen that before.

A. Yes, I have.

Q. When?

A. I could not state the date it was brought to me by investigators in the enforcement division to check the price that they used as the ceiling price.

Q. Will you state whether or not you examined these invoices for the ceiling prices to see that they were the appropriate ceiling prices?

A. I checked the ceiling prices as stated there.

Q. Checked them against what?

A. The regulation, itself, as it applied to this area, showing the prices.

Q. Will you state whether or not, during that period of June, 1943, there was any major change in prices?

A. There was a major change, that is why this particular piece of work needed immediate exam-

(Testimony of Albert L. Learney.)

ination, because there was a so-called roll-back took place in the middle of June, on June 14 that was.

Q. What did that roll-back amount to in cents per pound? A. Roughly, 2 cents.

Q. Was that the roll-back that gave rise to the question which was discussed? A. Yes.

Q. In your examination of the transcript and ceiling prices specified, do you recall now whether you found any errors and suggested any changes in the prices considered by the investigators?

A. No, I found no errors. We always submit new prices even to investigators, so that when the price change comes we [10] work out the price for them, and they simply use the price which I had submitted.

Q. You checked to see if the prices they had used were the same as you had given them, is that correct?

A. That is right.

Q. Will you state then whether or not the prices specified in the transcript as the ceiling prices are true, accurate and correct ceiling prices computed under the regulations?

Mr. Reagh: May it be understood that I have the same line of objection to this testimony that I have made?

The Court: State your objection; make your objection for the record.

Mr. Reagh: May I have the same objection to this testimony that I had to the testimony of Mr. Newman?

(Testimony of Albert L. Learney.)

The Court: Your objection to this question is on the same ground that you objected to the same question of the other witness?

Mr. Reagh: Yes, your Honor.

The Court: Yes.

Mr. Brunner: Q. I will ask you, Mr. Learney, whether you have checked, or in your work you have checked the amount of overcharges that appear from this transcript.

A. No, I did not.

Q. You did not? A. No.

Mr. Reagh: Mr. Brunner, I will probably be prepared to stipulate to that.

Mr. Brunner: You may cross-examine. [11]

Cross Examination

Mr. Reagh: Q. Mr. Learney, did you circularize the trade, informing them that you were at their service to advise them?

A. We are not so equipped to circularize.

Q. Then if a lady was not a butcher, merely the wife of a butcher, and troubled about the ceiling price, she would not have any way of knowing you had an office over there?

Mr. Brunner: I object to the question——

Mr. Reagh: Withdraw it.

Q. Mr. Learney, how many grades of meat—let us take first, how many grades of beef were there prior to the 14th of June, 1943, under the price regulations? A. Five.

Q. How many grades of beef were there?

(Testimony of Albert L. Learney.)

A. It is according to what types of meat, retail or wholesale.

Q. How many grades of pork were there prior to the 14th of June?

A. One grade of pork—there is no grade on pork.

Q. How many grades of mutton?

A. There are three grades of mutton.

Q. How many cuts of mutton?

A. Wholesale, do you mean?

Q. Wholesale and retail.

A. Wholesale and retail, there were approximately 10.

Q. Isn't it true that in order to secure uniformity throughout the United States the Price Administrator required beef to be cut in a certain way and that way differed from the method that had theretofore been used in the meat industry of this cate- [12] gory?

A. Not necessarily; it did at retail, but not necessarily at wholesale.

Q. It may or may not have differed?

A. Providing sufficient cuts, to make many different cuts in the carcass that were made before.

Q. Butchers were required to cut, under the requirement of the Price Control Act, in a certain way?

A. Yes.

Q. That way was different from the way that had been employed in this community before that time, is that not true?

A. Not necessarily.

(Testimony of Albert L. Learney.)

Q. In part?

A. There was no difference whatever in pork.

Q. I am talking about beef.

A. No difference in lamb, no difference in veal, and the difference in beef was an individual's own difference he might have had in cutting.

Q. Mr. Learney, can you tell me what the grades of beef you just mentioned are?

A. AA, Choice, A Grade, B Grade, Commercial, C Grade, Utility, and Canner and Cutter.

Q. Now, for the moment I am talking about beef. The first you say is AA?

A. Double A.

Q. And the second is Choice?

A. The second is Good or A grade.

Q. Does everybody agree as to whether a certain carcass should be Grade A or Double AA?

Mr. Brunner: Objected to as argumentative, and not proper cross-examination.

The Court: I will sustain the objection to that question. [13]

Mr. Reagh: We offer to show on cross-examination——

The Court: I think the form of the question is objectable, you asked if everybody agreed.

Mr. Reagh: It would be a question of opinion, would it not, as to whether a particular carcass should be graded A or AA?

A. The grading of carcasses is done by an expert from the Department of Agriculture.

Q. At the abattoir?

A. At the abattoir.

(Testimony of Albert L. Learney.)

Q. Was that true prior to the first price control?

A. Not in this section of the country, except for government buying.

Q. When did price control start in beef?

A. It started right after March, 1942. Specific prices were set up, I believe, in November or October, 1942.

Q. And at that time grading was instituted at the abattoirs?

A. Yes.

Q. By government experts?

A. Yes.

Q. Working under your direction?

A. Not under my direction.

Q. Did they stamp carcasses?

A. Yes.

Q. What part did they stamp as to beef?

A. The full length of the beef, and each side of the back down.

Q. How many recognized cuts under the Office of Price Administration of beef were there in June, 1943?

A. There was first of all the whole carcass, sides or the four quarters comprising the carcass; that is broken down into primary or wholesale [14] grades such as round, sirloin, short loin, blank, plate, brisket, rib, chuck and foreshank.

Q. Is that broken down again?

A. In turn, that is to cuts prevailing to purveyors of meals, and those cuts are further broken down into ready to cook pieces.

Q. That is the beef must be already cut?

A. Either already cut or in a piece ready to be cut.

(Testimony of Albert L. Learney.)

Q. I notice on this chart here ground meat; what was the ceiling price of ground meat in the month prior to the 14th of June, 1943?

A. I believe it was 21 cents for that particular one.

Q. What is ground meat?

A. Ground meat, ground beef, is specified in the regulations.

Q. Is ground meat specified?

A. Ground meat, ground beef.

Q. You testified a moment ago that the price on there for ground *mean* was correct, didn't you?

A. Yes, that price is correct.

Q. What is ground meat?

A. Ground meat in the trade usually is known as ground beef; occasionally they will call it by a different name.

Q. Can't you grind any part of the beef carcass?

A. Yes.

Q. What is commonly known as hamburger is ground meat? A. Yes.

Q. That is chuck and various parts that would be sausage otherwise?

A. Not according to the OPA.

Q. What is regulation?

A. In the OPA regulation they say ground beef is known as ground meat, and they stipulate—I don't know the exact wording of the regulation, I would not try to [15] repeat it, but they stipulate a certain price as being the highest price that might be charged for ground meat, ground beef.

(Testimony of Albert L. Learney.)

Q. Under the regulations could I go to a butcher shop, and could I in the month of June, 1943, have gone to a butcher shop and asked them to grind a sirloin steak for me? A. At retail, yes.

Q. If they had grown that piece of sirloin I would have to pay the sirloin price, wouldn't I?

A. That is at retail.

Q. Now, couldn't a purveyor of meat order any part of the carcass ground that he wanted to?

A. No.

Q. He could not?

A. He is not allowed to.

Q. Was it impossible for a customer to order ground round in the month of June, 1943?

A. According to regulations, yes.

Q. It would have to be ground round?

A. It could not be ground for anyone at all.

Q. In other words, a man who had a restaurant had to buy hamburger or had to pay hamburger prices no matter what was ground into that meat?

A. Yes.

Q. What was the ceiling price to the 14th of June, or what was the ceiling price on the 2nd of July? A. On what date did you say?

Q. On the 2nd of July, 1943?

A. The basic price was 19 cents a pound.

Q. There were certain other things that could be charged.

A. A quarter of a cent for delivery. [16]

Q. It made no difference in *grand* of meat?

A. No difference.

(Testimony of Albert L. Learney.)

Q. What was the price of top sirloin?

A. I do not attempt to remember the price.

Q. Can you refresh your recollection by reference to Exhibit 1? Can you refresh your recollection? You have the Price Control Act, haven't you, with you? Have you got the regulations here with you that were in effect at that time, Mr. Learney?

A. Prior to the roll-back?

Q. Yes, prior to the roll-back.

A. I have.

Q. Will you produce it?

A. This is the price subsequent to the roll-back.

Q. You have not got the price prior to the roll-back?

A. No.

Q. Will you be kind enough to call my attention to the regulation, or could you call my attention and indicate to me which of your regulations prohibit the selling of ground meat to purveyors?

A. Maximum Price Regulation 169. I have not it here.

The Court: The Court has a copy of 169, I think, in chambers.

Mr. Brunner: I doubt if your Honor has that.

Mr. Reagh: I doubt it, too. I was not able to find it.

Q. Are you familiar with this document, Mr. Learney?

A. We do not use those.

The Court: He may call it to your attention after the recess. [17]

Mr. Reagh: Would you be good enough to call my attention to the precise regulation after recess?

(Testimony of Albert L. Learney.)

A. Yes.

Q. When you checked Exhibit 1 did you check to determine whether or not the items were carried forward correctly?

A. All I checked was the price, correct ceiling price in effect.

Q. In checking those did you allow for delivery?

A. We did.

Q. Did you allow for grading?

A. Where grades were specified on the transcript.

Q. If the grades are not specified, you allowed the highest grade? A. Yes.

Q. It is customary, is it not, in some restaurants to serve hamburger mixed with sausage meat?

A. I would not know that; they could, yes; it would be possible.

Q. Are purveyors of meat permitted to sell ground meat, a combination of hamburger and sausage meat?

A. I imagine he could mix the things.

Q. That is true of ground meat?

A. Once it reaches the restaurant it is a different item.

The Court: I think we will take the noon recess at this time.

(After the usual admonition to the jury a recess was here taken until 2 o'clock p.m.) [18]

Afternoon Session, August 22, 1944, 2 P.M.

ALBERT L. LEARNEY,

recalled.

Cross-Examination—(Continued)

Mr. Reagh: Q. Mr. Learney, you have in your possession a price regulation which you showed to me, to which we referred this morning?

A. Yes.

Q. May I have it, please? A. Yes.

Q. This is not the only copy you have, is it?

A. This particular copy is the only copy.

Q. Is it in words and figures, except the price, the same as the current regulation?

A. This happens to be an amendment to that particular regulation.

Q. May I have the current regulation?

A. Yes.

Q. You have plenty of these, haven't you?

A. Yes.

Mr. Reagh: I am going to offer it for identification as part of the cross-examination of the witness. I suppose the Court will take judicial notice of it, but at the same time perhaps I had better have it marked.

Mr. Brunner: That is all right.

Mr. Reagh: May I offer it in evidence as part of the witness' cross-examination?

The Court: I do not think that would be proper.

Mr. Brunner: Do you make an offer?

Mr. Reagh: Yes, as part of the cross-examination. [19]

(Testimony of Albert L. Learney.)

Mr. Brunner: I will object to it, if your Honor please, upon the ground that a great deal of the regulation is immaterial, and also on the ground that the regulation is the best evidence.

Mr. Reagh: The reason for doing that was Mr. Learney said that the copy he had was the only copy he had, and I did not want to put that in evidence and take it out of his possession. If you press the objection I will have to do so; it is the same as the other regulation except as to price.

The Court: I will permit you to have it marked for identification, so that you may have some means of referring to it. The regulations are not admissible in evidence. The court will instruct the jury as to what the regulations provide, but if you desire to question the witness as to a particular item of the regulations at that time, as to what the ceiling price was, of course you have a right to do that.

Mr. Reagh: That is not the purpose. I did not wish to deprive Mr. Learney of his only copy.

The Court: It has already been marked for identification. You can examine the witness on it.

Mr. Reagh: If Mr. Brunner *sees* fit to press that objection it is good.

Mr. Brunner: I fail to see the connection.

Mr. Reagh: I will withdraw this. Will you let me have that copy that you have?

A. Yes. [20]

Mr. Brunner: Your question is directed to ground beef?

(Testimony of Albert L. Learney.)

Mr. Reagh: Yes. Now, we offer this and ask that it be marked as part of the cross-examination.

The Court: I will allow it to be marked for identification. It is not in evidence, because it is the duty of the court to instruct the jury as to the law.

(The regulation was marked Defendants' Exhibit A for Identification.)

Mr. Reagh: Q. I observe, Mr. Learney, that Plaintiff's Exhibit 1, which heretofore has been shown to you, bears the handwriting of several different people. You checked that, did you?

A. I did not check that.

Q. When you checked that you assumed that the persons who had written that out had copied it from some original document?

Mr. Brunner: I think that is not proper cross-examination, and he is assuming the answer, for the reason that I recall Mr. Learney said he merely had checked the figures against the regulation.

Mr. Reagh: That is correct, and I withdraw the question.

Q. What you did on this was merely to check the figures to be sure that the items shown and amounts stated and the weight and maximum price regulation corresponded?

A. I did not check that. The only thing I checked was what they had noticed there as the ceiling price as being the actual ceiling price.

Mr. Reagh: That is all [21]

Mr. Brunner: No further questions. I would

(Testimony of Albert L. Learney.)

ask the Court's indulgence to recall Mr. Newman for a few more questions.

OLLIS W. NEWMAN,

recalled by plaintiff.

Mr. Brunner: Q. Mr. Newman, in considering the prices which appear, that is the ceiling prices which appear in Plaintiff's Exhibit No. 1, did you have in mind the fact that grading enters into the question of price?

A. Oh, yes.

Q. And in computing the price what grade did you use where the invoices did not show the grades of the meat that was sold?

Q. We always examine all of the meat available in the shop whenever we are making an inspection, and in some cases I follow the meat to the destination, and identify the meat. As was stated this morning on beef, particularly, the grand mark, the Government grade mark on the beef sold; because the invoice does not show the grade does not mean that the meat was not graded.

Q. In computing the prices which you testified you had computed, that is the proper applicable maximum prices, you took into consideration, did you not, what grade it was?

A. Generally speaking, I think it was B grade.

Q. I show you Plaintiff's Exhibit No. 1 in evi-

(Testimony of Ollis W. Newman.)

dence, the second page, which is marked B on the upper right-hand corner? A. Yes.

Q. "Grade B figured." A. Yes. [22]

Q. Is that in your handwriting?

A. That does not happen to be my handwriting, but it was put there at my instructions.

Q. Will you say that was true with these items?

A. Oh, yes.

Q. Do you know what grade was used in figuring lamb?

A. I could not tell you now, it has been quite sometime.

Q. You do not now recall? A. No.

Q. I understood you to say that you looked at the meat in a particular shop at the time you made an investigation. A. Yes.

Q. I am referring to the shop of the seller, not the shop of the buyer.

A. The shop of the buyer.

Q. You did not go to the shop of the buyer here, did you? A. Yes.

Q. In every instance?

A. No. Wherever there was a question of doubt we always raised the grade.

Q. Raised the grade? A. Yes.

Mr. Brunner: That is all.

Cross-Examination

Mr. Reagh: Q. How many shops did you go to?

A. Well, I do not believe I could answer posi-

(Testimony of Ollis W. Newman.)

tively but I would say at least over half a dozen.
You are speaking now of grades?

Q. Yes.

A. And we followed out a large part of the invoices to destination.

Q. When did you get these invoices?

A. We got these invoices in July.

Q. You got them in July? A. Yes. [23]

Q. Then you went to the shop to see what grade was delivered? A. Yes.

Q. The meat had been consumed, hadn't it?

A. Not in all instances.

Q. A person who ordered hamburger, for example, in June, did they still have hamburger on hand in July? A. No.

Q. If a person ordered beef stew on the second day of June, the Two Flags down here, beef stew on June 2, when did you go to see the Flags?

A. We went to Flags to identify other things in connection with the invoice.

Q. Did you go to Pearce's?

A. That is a restaurant.

Q. Yes? A. Yes.

Q. Did you go to Hamburger Gus?

A. Yes.

Q. To Jimmie's? A. Yes.

Q. How many times did you go to Jimmie's?

A. We called at Jimmie's twice.

Q. How many times did you call at Peace?

A. Once that I know of.

(Testimony of Ollis W. Newman.)

Q. How many times did you call at Hamburger Gus'?

A. Twice.

Q. How many times did you call at Mead's?

A. Only once that I know of.

Q. How many times did you call at Garcia's?

A. I called once.

Q. How many times did you call at Floyd's?

A. I don't remember.

Q. At John's?

A. I did not go to his place.

Q. At Monroe's?

A. I did not go to his place. [24]

Q. How many times did you go to Stacey's?

A. I don't remember that one. He had a lot of accounts.

Q. How many times did you go to Bean's?

A. I don't remember that one.

Q. How many times did you go to Waho's?

A. I think we were there once.

Q. How many times to Cirius'?

A. I don't remember.

Q. How many times did you go to Butte?

A. I don't remember that one.

Q. How many times did you call at Mother's Cafe?

A. We did not go to all of them, he had a lot of accounts.

Q. How many times did you go to the Golden West Tamale Company?

A. Not at all.

Mr. Reagh: That is all.

Mr. Brunner: That is all.

(Testimony of Ollis W. Newman.)

The Court: Have you any more witnesses?

Mr. Brunner: The plaintiff will rest.

The Court: Do you desire to make a motion now, counsel?

Mr. Reagh: Yes, your Honor.

(Thereupon the jury retired to the jury room.)

Mr. Reagh: The defendant, plaintiff having rested, now moves that the court direct the jury to return a verdict in favor of the defendant, for the reason that the proof utterly fails to establish any case, in that there is a complete failure of proof that there was anything other than misbilling, the testimony of the witness having been that Plaintiff's Exhibit 1 [25] upon which he relied was simply a transcription or copy of the carbon copies of bills which had been sent; there is no proof of any transaction, that any merchandise was ever delivered, that any merchandise was ever paid for, that any merchandise was ever ordered or sold to any of the persons whose names appear in the margin of Plaintiff's Exhibit 1. I understand the court's ruling heretofore will be adhered to, that this is not a penal statute; the position taken by the defendant is that it is a highly criminal statute, and in view of the amendment which has been made in the last session of Congress it seems hard to understand how it could be treated other than a criminal statute; the amount of damages for overcharges may depend entirely upon intent, and it is our position that the statute is penal, that strict

proof is called for in support of a penalty, everything must be proved and nothing left to surmise.

I renew our objection to Plaintiff's Exhibit No. 1, and move to strike it out, on the grounds stated in our objection when it was received in evidence, and without Plaintiff's Exhibit 1 there would be no case; we believe that Exhibit No. 1 is not the best evidence of any kind; at most Exhibit No. 1 might be treated as secondary evidence that Mr. McDonald or somebody had sent out bills for merchandise in excess of the ceiling price; they are not contracts, they are not charges.

The Court: I do not want to interrupt you, but I did not understand that was the testimony. I understood the tes- [26] timony to show that this Plaintiff's Exhibit 1 was a tabulation of the actual sales slips——

Mr. Reagh: Of the invoice slips.

The Court (Continuing): ——of the defendant for merchandise that was actually sold and delivered.

Mr Reagh: There is no showing that any merchandise was sold or delivered. The showing is that the plaintiff went to the defendant's place of business and asked for and was given some tags.

The Court: As I understand it this transcript is a copy of the records of the defendant.

Mr. Reagh: No, it is an abstract of these sales tags.

The Court: But it is an abstract, a copy of the defendants' own records.

Mr. Reagh: Of the sales tags found in his place of business.

The Court: I think if you prove from a man's own records that he made a sale that is at least some evidence from which the jury can conclude that those sales and deliveries of merchandise were made. That could not be said to make out a *prima facie* case, but to go beyond the defendant's own records and actually prove by the man in the store, the customer, and the man on the truck, that took it to the place of delivery, I think that type of proof would be far beyond any normal requirement. [27]

Mr. Reagh: It would possibly in some cases, but in the case of a penal statute penalties are not favored in the law; they are disfavored.

The Court: I do not think any higher degree of proof is required in this case, the case being a civil case, than any other type of case, unless the statute so provides. However, I did not want to interrupt you. I just wanted to clarify my mind as to what your point was.

Mr. Reagh: Now on the question of damages, from the record as it stands it is impossible to fix any sum for damages, because when your Honor examines Exhibit No. 1 your Honor will see that it is based entirely on guesswork, in that the grades shown by the evidence have varying prices. These grades are shown as B and C. I asked Mr. Newman on the witness stand how many times he had been at the various places and two was the greatest

number he had been, and the only place mentioned that he had been two times is mentioned in at least 25 different items, and he fixed the grade from what he saw on two occasions without following the meat for getting the grades that number of times; he might have said three; he took the grades of them and averaged them. For a business man to make up his mind on a question of damage that might be sufficient, but for a man who seeks to recover damages in court he must go further than that, he must show what the damages were specifically on each of the items on page after page. An effort was made to show that he followed the meat [28] through, but on cross-examination it developed he only followed it through possibly for incidental purposes, but certainly not enough upon which a jury could base a verdict on damages. It does not appear that he followed through the meat to get the grades; in other words, the jury could only conjecture as to the grade of meat shown by Plaintiff's Exhibit 1.

Moreover, when your Honor examines Exhibit 1 you will find that the person making it out did not know what he was copying. You will find on page after page that the writing is so bad that a question mark appears, you cannot tell what it means. Some places the question mark is in red ink. Some person who could not read the handwriting made this copy; in some places you cannot make out what was sold. Now, how can a jury base its verdict entirely upon this. Here, for example, we have

hearts with a question mark, weight $7\frac{1}{4}$, price 30, C.P. $17\frac{3}{4}$, overcharge 88 cents. The person who put that overcharge of 88 cents did not know what it was that he was putting an overcharge down for. In some way or another the jury has got to fix on a specific amount.

The Court: Why didn't you bring these matters out on cross-examination, if you think there was anything inaccurate in that statement?

Mr. Reagh: The statement is there and speaks for itself.

The Court: Why didn't you go into those matters and examine the witness who made the statement? [29]

Mr. Reagh: Why should I go into the statement? Your Honor has admitted it in evidence, and there it is, and upon that the plaintiff rests. It is not for me to point out discrepancies; if a document is in evidence it speaks for itself.

The Court: The document was introduced in evidence on the basis of the testimony of the witness who testified that it was a correct transcript of the sales records of the defendant, and that there was appended to it the ceiling price of each item and of the price actually charged, and upon the basis of such testimony Exhibit 1 was admitted in evidence. Now, if you wanted to attack that you could have cross-examined the witness and developed matters that go to the credibility and weight of this statement. I do not see how I am called upon to make

a ruling in connection with it now without having in the record what you are suggesting now.

Mr. Brunner: We sought to accomplish that by pre-trial.

Mr. Reagh: How could that help us? I couldn't read your handwriting; I should be given something I could read.

Mr. Brunner: If you pointed out to us the particulars you could not read we would be glad to discuss those questions and maybe we could have smoothed them out.

Mr. Reagh: You should strike out at least one-third of this.

The Court: You cannot escape the effect of the exhibit by your own inaction in regard to it. If you had wanted to [30] point out those matters you could have pointed them out. The Court cannot direct the attorney in the proof he makes in offering it in evidence.

Mr. Reagh: Your Honor expects the defendant to prove its case. It is for the plaintiff to prove his case. My point is that no jury can base its verdict upon a document like this.

The Court: You have had an opportunity to go into this matter before the trial and you still have an opportunity to examine the OPA witness to find out whether there is any question about any of these matters.

Mr. Reagh: I would rather not. It is a technical proposition.

The Court: You simply want to take the position you do not want to look into those matters?

Mr. Reagh: That is exactly right.

The Court: It is not for me to tell you how you should handle your case, you are an experienced lawyer and I would not even presume to do that, but I can rule on such questions of law as are presented to me. Have you stated all of the grounds you wish to state for a directed verdict?

Mr. Reagh: I think so; no proof of delivery, no proof of payment, and no proof of any sale of merchandise, no proof of the grade of the merchandise, no proof of payment. The exhibit is too indefinite and too vague and too uncertain to be the basis of a judgment. [31]

The Court: The motion for a directed verdict will be denied. You may bring the jury back.

(Thereupon the jury was returned to the court-room.)

The Court: The jurors are all present, you may proceed.

Mr. Reagh: I have already made my opening statement. I will call Mrs. McDonald.

MARY E. McDONALD

called as a witness by the defendant; sworn.

The Clerk: Will you state your name to the Court and jury, please?

A. Mary E. McDonald.

(Testimony of Mary E. McDonald.)

Mr. Reagh: Q. Mrs. McDonald, the defendant A. N. McDonald is your husband, is he not?

A. Yes.

Q. The business in Oakland conducted by your husband is partly retail and partly wholesale, selling to restaurants and people of that kind, is it not?

A. Yes.

Q. Did your husband leave Oakland in the month of May, 1942?

A. He went about the 18th of May.

Q. Do you know where he went?

A. He went back home. The doctor thought he should go back home to get a rest and get away from the business, he was working too hard.

Q. Where did he go to, you say he went back home?

A. He went back to near Montreal.

Q. Do you know how long he intended to be gone when he left?

A. He thought about three weeks, between two and three weeks. [32]

Q. When did he return?

A. He returned the 9th of July.

Q. The 9th of July, 1943? A. Yes.

Q. Do you know the reason for his failure to return sooner?

A. Well, he took sick up there, and when he was able to return home there was a death in the family at Seattle, and I had to go there.

Q. While he was gone were you in charge of the business, Mrs. McDonald?

(Testimony of Mary E. McDonald.)

A. I was, I was trying to do it.

Q. How many employees, normally, are employed in the shop?

A. Before the war we used to have about seven or eight.

Q. At that particular time when Mr. McDonald went away how many people were there working?

A. When he went away, there was a man in the wholesale, and Mr. Finke and one man in the retail, and myself.

Q. There had been a contemplated partnership between your husband and Mr. Finke before that time?

A. Yes.

Q. That had fallen through?

A. Yes.

Q. Now, after Mr. McDonald went away did all of the employees stay, or did some of them leave?

A. No, the men that we had to help went to work at the shipyard, two of them were drafted, and then we had a man that used to work a while but he went out celebrating and we could not depend on him.

Q. What does your own household consist of?

A. I had two girls, one of whom was sick, and I had my son, who went away.

Q. These men that were drafted and the men that went to the [33] shipyard, was that during the period of several weeks while your husband was away, or did that occur before he left?

A. Just about that time, some of them went before and some of them were not there at the time, I don't know just when they left, it was within a few months.

(Testimony of Mary E. McDonald.)

Q. Who does the housework at your house?

A. I do.

Q. How old is your eldest daughter?

A. Well, she will be sixteen, she is only in grammar school, she has not been well.

Q. How old is your second daughter?

A. She is ten.

Q. At that time she was nine? A. Nine.

Q. Mrs. McDonald, did you, yourself, work in the business there during the time your husband was away? A. Yes.

Mr. Brunner: I am going to object, your Honor, for the purpose of the record. I take it that this question by counsel is directed to the so-called Chandler defense under the Act. I might call your Honor's attention to the fact that the defense is not pleaded.

The Court: I do not think that has to be pleaded, it has to be proved.

Mr. Brunner: It is our position it has to be pleaded as part of the defense. We are entirely willing to consent in order that counsel may save any point on that that he may amend to so state.

The Court: I will overrule the objection.

Mr. Reagh: Q. Mrs. McDonald, did you intend to violate [34] any OPA regulation?

A. No.

Mr. Brunner: That calls for a conclusion.

The Court: I think that calls for the opinion and conclusion of the witness.

(Testimony of Mary E. McDonald.)

Mr. Reagh: Q. Did your husband instruct you to violate, to sell meat at other than ceiling prices?

A. No, he told me to try to follow the bills or the pamphlets or whatever it was that come out from the OPA, or from the Butchers Union, whatever they were.

Q. There was a pamphlet that came?

A. Yes, with prices and cuts, and he said to follow it as closely as I could and do the best I could, and people would come in, they couldn't get meat any place else, they would be in a hurry, they would want something, and Mr. Finke would work sometimes eighteen and twenty hours a day trying to get out the orders and do the best he could, and might have made mistakes, but if he did it was unintentional.

Q. Did you instruct anybody to sell at a price higher than the price posted? A. No.

Q. Who did the billing, Mrs. McDonald?

A. Well, sometimes I did if they were in a hurry for it; we never yet had a customer that had a complaint; they knew that Mr. McDonald would not intentionally overcharge them, he never had a complaint; if the bill was not made out at the time they would wait until I was able to. [35]

Q. At this particular time who did the billing?

A. I did most of it, as far as I can remember.

Q. Mrs. McDonald, you are not a butcher by trade, are you? A. No.

Q. Do you have any knowledge of grading meat?

A. No.

(Testimony of Mary E. McDonald.)

Q. The only knowledge you have of grades is just the fact that your husband is a butcher and you have heard him talk about it?

A. I know about what meat we had.

Q. In other words, you had an individual's knowledge of meat other than a butcher's knowledge?

A. Yes, that is all.

Q. Did you hear from your husband from time to time while he was in Montreal?

A. Well, his sister wrote most of the time, I got messages.

Q. After he got sick his sister wrote?

A. Yes.

Mr. Reagh: That is all.

Cross-Examination

Mr. Brunner: Q. Mrs. McDonald, when your husband was away you say that you tried to follow posted prices. What prices were those?

A. Well, they came in, we had printed sheets, I don't know where they were from, they were posted up, and when the bill was made out, whatever price appeared as what they were selling for, I tried to follow them.

Q. What I was interested in primarily was this question of posted prices. Did you get a slip of some kind from someone?

A. I don't know where it came from, but there was one in the shop there. [36]

Q. You don't know whether it came from the Office of Price Administration or not?

(Testimony of Mary E. McDonald.)

A. No, I couldn't say about that.

Q. I understood you to say that your husband, when he left, told you to try to keep in line with the prices at the Office of Price Administration, is that correct?

A. Well, he said whatever the prices was to try to follow them, and I did, as near as could, and Mr. Finke, he would tell me if I was mixed up in it.

Q. Mr. Finke is a butcher, is he not?

A. Yes.

Q. You carried on the bookkeeping end of the business and billing, isn't that true? A. Yes.

Q. Mr. Finke carried on the cutting of the meat and the cutting up of the orders, and such things?

A. No, we all helped to put up the orders.

Q. You helped put up orders? A. Yes.

Q. But Mr. Finke cut the meat for you, did he not? A. Yes, most of it.

Q. You would go into the meat chest and get the meat, or you would merely wrap up what Mr. Finke gave you?

A. Sometimes I would go into the case and get some meat, whatever it was.

Q. That was already cut?

A. That was already cut, and put them up.

Q. But at the times when you went in to get it you never checked what grades of meat they were, you never checked whether it was A or B?

A. He would tell me where to go and I would go.

(Testimony of Mary E. McDonald.)

Q. He would tell you where to go and you would go and get it? [37-8] A. Yes.

Q. And put it up? A. Yes.

Q. But you never checked particular meat to determine whether it was B or C meat? A. No.

Q. All you did was simply go to a particular place and get meat that was there and wrap it up?

A. Yes.

Q. Did you ever, as you were running the business when your husband was away checked for grade under the regulations?

Mr. Reagh: I object to that as immaterial, irrelevant, and incompetent, and calling for a conclusion.

The Court: Objection overruled.

Mr. Brunner: Q. Did you ever check for grade under the regulations?

A. Well, I don't remember doing it, but I did try to follow the way they had been doing, and no one had complained, the authorities had been in there, and nobody had complained anything was wrong, so I was doing the best I could.

Q. You don't know who had been in there?

A. No, we were working so hard, everybody was calling for the meat, and we were doing the best we could.

Q. Doing the best you could to keep them supplied?

A. We had shipyard restaurants, and had schools, and hotels, and colleges, and we did the best we could.

(Testimony of Mary E. McDonald.)

Q. Did you try equally as hard or at all to see that the prices you charged were appropriate and proper?

A. Well, according to what the ordinary prices were, we were not adding anything onto them, except what you are allowed for delivery and for [39] overhead charges and things like that.

Q. You might say then that to the ordinary charges that you had in business you added the ordinary margin of profit?

A. Well, I think so.

Q. Did you ever call at the office of Price Administration and ask anyone whether any prices were proper?

A. No. When Mr. McDonald came back he had me go over and look over things. I went over and got a list for him when he came back.

Q. That was after he returned?

A. When he returned.

Q. Did you then find that the prices that you had been charging were in line with the list that you got?

Mr. Reagh: Just a moment, I object to that as——

Mr. Brunner: I will withdraw the question.

Q. You mentioned something about a list published by some association, is that true?

Mr. Reagh: I did it in my opening statement.

M. Brunner: I thought she did in her testimony.

Mr. Reagh: She said she got a list, she didn't

(Testimony of Mary E. McDonald.)

know the source it came from, a printed list with the maximum prices.

Mr. Brunner: Q. Do you know whether that list was from an association?

A. Well, I didn't work at the shop except when it was very busy. The first time I went down was when meat was so scarce, and Mr. McDonald was out in the country trying to bring in meat, and I would go down and help. That is all I know about how the business was carried on. [40]

Q. When your husband was away you were taking care of the business and helping out but the man who was in actual charge there was Mr. Finke, wasn't he?

A. Well, he was in charge of the work, but Mr. Finke was not any too well, himself; he was working hard, and he said he was not taking any responsibility.

Q. Who made the price list on the meat that was sold?

A. Well, I guess Mr. Finke; he told me to take the prices from the list that was there, so many times at so much, whatever it was.

Q. Then, as I understand it, you were following his directions in pricing certain meat?

A. Yes.

Q. And outside of those directions you did not take any pains, yourself, to determine whether that list which he told you to follow was the proper list, or not?

(Testimony of Mary E. McDonald.)

A. Well, it was a list that was printed there.

Q. And you merely followed the list that he told you to follow? A. Yes.

Mr. Brunner: That is all.

Redirect Examination

Mr. Reagh: Q. Mrs. McDonald, I want to clear up one thing. On your cross-examination you spoke of the customary margin of profit. In pricing meat you paid no attention to what the meat cost, did you? A. No.

Q. In other words, you proceeded entirely on the list posted in your place of business?

A. Yes. [41]

Mr. Reagh: That is all.

Mr. Brunner: That is all.

Mr. Reagh: The defendant rests and renews the motion.

The Court: Do you wish to renew the same motion as before?

Mr. Reagh: May I make it generally on the grounds that were made at the conclusion of the plaintiff's case?

The Court: Very well.

Mr. Brunner: I have a motion I would like to make, your Honor. I think your Honor will probably exclude the jury.

The Court: Do you wish to make that in the absence of the jury?

Mr. Brunner: I think it had best be made in the absence of the jury as it is on a question of law.

The Court: I think we can excuse the jury until tomorrow morning.

Mr. Brunner: I think so.

(Thereupon, with the usual admonition, the jury was excused until Wednesday, August 23, 1944, at 10:00 o'clock a.m.)

The Court: You may proceed, Mr. Brunner.

Mr. Brunner: If your Honor please, before I begin my argument I am going to hand to your Honor a couple of additional instructions; counsel already has a copy, and I likewise hand to your Honor interrogatories which we request be submitted to the jury in connection with the general verdict. Counsel likewise has a copy. [42]

Our motion is, we move for a directed verdict on behalf of the Price Administrator for three times the actual amount of the overcharges, upon the ground that there is no evidence before the court which would call for the exercise of the Court's discretion set forth in the Emergency Price Control Act as amended by the Stabilization Act. The position which the Price Administrator assumes is that which is specified in the instruction.

(After argument:)

The Court: The motion for a directed verdict will be denied. We will now take up the matter of instructions.

(Thereupon the matter of instructions was taken up, at the conclusion of which an adjournment was taken until tomorrow, Wednesday, August 23, 1944, at 10:00 o'clock a.m.)

[43]

Wednesday, August 23, 1944,

10:00 o'clock a.m.

The Court: With respect to the instructions proposed by the plaintiff the Court will give Instruction No. 1, No. 2, and No. 3, and No. 4 in substance; No. 5 it will give the pertinent provisions of the statute; it will give No. 6, the first sentence of No. 7 in substance, the first paragraph of No. 8 in substance; No. 9 is refused, and No. 10 is refused, inasmuch as the Court will instruct the jury in substance in the language of the statute. No. 11 is refused, because it will otherwise be given in substance. The last sentence of No. 13 will be given in substance. No. 12 will be refused, but the Court will instruct the jury that the general law is that a principal is liable for the acts of his agent committed in the course of his employment; the special interrogatories requested to be submitted to the jury will be refused.

As to the defendant's instructions, No. 1 is refused because there are some parts of it that the Court feels are not proper under the circumstances; No. 2 is refused; No. 3 will be given in substance; No. 4 is refused; No. 5 is refused; No. 6, 7, 8, 9, 10, 11 and 12 are refused, as not being germane to any issue of fact in the case; No. 13 will be covered in the course of the general instructions; No. 14 is refused; No. 15 is refused; No. 16 is refused; No. 17 is refused, No. 18 is refused on the ground that the

rule is too general as to actions of this [44] statutory type; No. 19 is refused. The Court intends generally to instruct the jury as to the statutory provision and on the so-called Chandler defense.

The Court intends to instruct the jury that it is for the jury to determine under all of the facts and circumstances whether or not the acts of the defendant were willful and not supervised by practicable precautions, and that if that defense was sustained and the jury so finds that the verdict of the jury could be limited to the actual overcharges.

The Court also intends to comment on the facts with respect to the pre-trial order and Plaintiff's Exhibit 1, offered in evidence to the extent that in the opinion of the Court the evidence is sufficient in that regard to establish the amount of overcharges set forth in Exhibit 1, but that the jury is not bound by the opinion of the court.

The jury may be brought in.

(Thereupon the jury was returned into court and counsel argued the case, at the conclusion of which the Court charged the jury as follows:)

The Court (Orally): Ladies and Gentlemen of the jury, I will ask you to give your attention to the Court at this time so that I may give you the applicable principles of law that will guide you in your determination of this case.

Let me say to you first of all, by the law, you have the exclusive function of deciding the facts in the case. The [45] judge gives you the law and

endeavors to guide you in determining the facts by advising you as to what the legal provisions are that are pertinent to the particular case. As judge of the court I do not express any opinion to you as to what your finding should be in the case, nor do I want you to understand from anything that has taken place in your presence during the trial or from any ruling which the court has made that I intended to say to you how you should decide the case.

During the course of the trial the court has been called upon to pass upon objections and perhaps some comments have been made by the court in making such rulings; such comments the jurors should not take into account, nor should the jury assume from anything the court might have said in the course of its rulings that the court was expressing an opinion as to how the jury should decide this case.

You should, of course, in this suit, as in any case, exclude any sympathy or prejudice from your mind.

Let me first cover some of the simple rules that you should have in mind in weighing the evidence in the case.

Whether or not you believe the witnesses who have testified and the weight to be attached to their testimony respectively is a matter for your sole judgment.

A witness is presumed to speak the truth, but this presumption may be negated by the manner in

which he or she testifies, by the character of his or her testimony, by contradic- [46] tory evidence, or by his or her motives. In passing upon the credibility of the various witnesses, it is your right to accept the whole or any part of their testimony, or to discard and reject the whole or any part thereof.

If it appears to you and it is shown that a witness has testified falsely on any material matter, you should distrust his or her testimony in other particulars, and in that event you are free to reject all of the witness' testimony.

This is a civil suit and the plaintiff has the burden of proving the affirmative allegations of the complaint. As to the special defense upon which evidence has been adduced by the defendant, as I will hereafter point out to you, the burden is upon the defendant in that connection to establish that defense by a preponderance of the evidence, just as I stated to you the plaintiff must establish the affirmative allegations of his charge by a preponderance of the evidence.

A preponderance of the evidence means its greater weight in reference to its credibility; it depends not necessarily upon the number of witnesses testifying, but rather upon the character of the testimony with reference to its probable truth or falsity.

In determining the preponderance of evidence, you should scrutinize the testimony given carefully and in so doing consider the following elements: the circumstances under which the witness testifies; his or her demeanor and manner on the [47] stand;

his or her intelligence; the connection or relationship which he or she bears to either party; the manner in which he or she might be affected by your verdict; the extent to which he or she is contradicted or corroborated by other evidence, if at all; and any other matter which reasonably sheds light upon the credibility of the witness.

The attorneys in their arguments have commented upon and argued upon what the facts are. If you find any variance between the facts testified to by the witnesses and what has been stated to you by counsel to be the facts, to the extent of such variance you must consider only the facts testified to by the witnesses.

Now, I think the court mentioned to you at the time of your empanelment as jurors you should have no preconceived notions about the particular law pursuant to which this case has come into this court. You are not concerned here in trying the Price Control Act; whether you like the law or not, it is a law that has been adopted by you yourselves through your representatives, and therefore no consideration based upon any preconceived notion on your part as to what you think should have been the law or how you like the law, should enter into your consideration of the question of fact which is submitted to you under this law.

This law, which is designated as the Price Control Act, was passed by Congress in 1942, and has been amended on more [48] that one occasion. The Price Control Act was adopted by Congress, as you well know, after some discussion, consideration and re-

flection. Congress determined that the battle against inflation to preserve the domestic economy was regarded as important as the armed conflict itself, and in fact it was stated in Congress it was "unlimited national mobilization in a war for survival". It was further stated in Congress that "of all the consequences of war except human slaughter, inflation is the most destructive".

It was on the basis of that background that Congress concluded that it was essential to the successful conduct of the war to pass this law which is called the Price Control Act. Now, if you bring to a consideration of this case any preconceived notion of your own, to which I have referred, about this law you will not be properly performing your duty as jurors in this court. And it is not amiss to comment to you at this time that in the Federal court for over a century and a half a high tradition in the administration of justice has obtained.

The Price Control Act under which this suit is brought, provides, among other things:

"It shall be unlawful, regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, [49] in violation of any regulation or order under section 2, or any price schedule effective in accordance with the provisions of section 206, or to offer, solicit, attempt, or agree to do any of the foregoing."

By the Price Control Act there was committed to the Price Administrator power and authority to

promulgate certain regulations. Pursuant to that power and authority he did establish certain price regulations. Among those regulations were certain rules concerning the price to be charged for meat by persons engaged in the same type of business in which this defendant, by the evidence, is shown to have been engaged.

In the event of a violation of a price regulation, that is, in the event that one is engaged in business, and subject to this Act, sells merchandise in excess of the price fixed in the regulation, it is provided that an action may be brought to recover damages for such overcharges.

By the statute a consumer can bring an action for damages for overcharges, but there was committed to the Administrator himself the right to bring such action for overcharges in cases where the overcharges occurred in the course of trade or business, that is, in transactions between merchants.

This court has stated in a case not so long ago decided that apparently it was the intent of Congress that enforcement of the Act by bringing actions for damages for violation of the Act, should not result in intercommercial litigation between merchants; that in cases where there were transactions between [50] merchants, wholesalers and retailers and the like, the Administrator should have the power and the right to bring actions for overcharges, whereas the only case in which an action might be brought by an individual or a citizen would be in the case of where the individual or citizen was actually a consumer of merchandise; and so in this

case, the nature of the business of the defendant being such as is disclosed in the evidence, it was proper for the Price Administrator to bring this action.

Now, at the present time under the law it is the opinion of the court, and I so instruct you, that so far as any damages are concerned in excess of actual overcharges, if the defendant has not proved to you by a preponderance of the evidence that the violations of the Price regulations were neither wilful nor the result of failure to take practicable precautions against the occurrence of violations, you have the discretion of determining how much damages may be awarded over and above the actual overcharges, but not to exceed three times the amount of such overcharges.

By the Emergency Price Control Act of 1942 the Price Administrator, that is the plaintiff, has the authority to fix the maximum price for the sale and delivery of pork, beef, veal, lamb and mutton cuts, sausage items and variety meats, and edible by-products, which he has done by issuance of appropriated regulations.

In this case there is an exhibit which has been admitted in [51] evidence, which is a transcript made by the Price Administrator of the records of the defendant during the period in which it is charged that violations of the regulations occurred, which is known as Plaintiff's Exhibit 1. In connection with this exhibit, the court wishes to advise you as a matter of law as follows: in the Federal

court we have certain rules which are known as Rules of Civil Procedure. The purpose of these rules is to expedite the trial of cases and to provide for stipulations and admissions by the parties so that certain facts may be settled in advance of trial to cut down the time and the labor attending upon the trial; and such facts as may be stipulated to and admitted or ordered by the court may not be inquired into at the trial and may be deemed to be true and correct for the purpose of the trial. Pursuant to that procedure the court made what has been described to you by counsel as a pre-trial order. By that pre-trial order it was determined that the transcript which is marked Plaintiff's Exhibit 1 would be submitted to the defendant and that the defendant could point out any incorrect statements of fact in that transcript, and failing that, the transcript would be deemed to be a correct statement of the facts therein set forth. The record in this case shows that no such errors or corrections were pointed out in that transcript, Plaintiff's Exhibit 1, therefore, is before you as a correct statement of the facts therein contained and may be so considered by you. [52]

It is the opinion of the court that that record, plus the testimony of the witnesses produced by the plaintiff, establishing the fact that overcharges in the total sum of \$4,134.70 were made by the defendant. That opinion of the court, however, is not binding upon the jury. It is merely the opinion of the court and you may come to a different conclu-

sion if you feel that that record does not establish the fact which I just stated to the jury.

You should not assume that because a complaint has been filed you must necessarily award judgment in favor of the plaintiff. There is no presumption that arises from the filing of the complaint that the plaintiff is entitled to judgment. You must determine whether or not the plaintiff is entitled to judgment from the evidence in the case, guided by the instructions of the court.

Now, I have already called your attention, Ladies and Gentlemen of the Jury, to a special defense which the defendant has urged. The defendant, by his counsel, has argued to you that the evidence in this case shows that you should not award damages above the overcharges, because the evidence shows, as contended by the defendant, that the defendant did not act wilfully nor did the violations result from a failure to take practicable precautions against the occurrence of the violations.

I wish to advise you that the term "wilful" as used in the statute means purposely or obstinately. It is designed to [53] describe the attitude of a person who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to the requirements.

"Practicable precautions" as used in the statute are those precautions that would be adopted and safeguards that would be maintained by a reasonably prudent business man under all of the circumstances to prevent and guard against his violating

price regulations or schedules applying to his business.

An employer or a principal who entrusts the conduct of his business or part of his business to employees or agents is, under general principles of law, bound by the acts of the employees in the regular scope of the employment.

It is for you to determine under the facts and circumstances in this case whether or not the defendant has proved by a preponderance of the evidence that the defendant's violations of the price schedules, if you find that there were such violations, were not wilful and not the result of failure to take practicable precautions to prevent and guard against the occurrence of violations.

It is defendant's duty to inform himself of price regulations and schedules issued by the Price Administrator affecting his business, and it is his duty to conduct his business in such a manner as to prevent violations of such regulations.

Now, Ladies and Gentlemen of the Jury, I think that is a fair and proper statement of the law applicable to this particular charge.

It is your duty, and you are expected, to agree upon a verdict if you can conscientiously do so. You should freely consult with one another in the jury room. If any of you should be convinced that your view of the case is erroneous, do not be stubborn and do not hesitate to abandon your own view under such circumstances. On the other hand, it is entirely proper to adhere to your own view, if after

a full exchange of ideas you still believe you are right.

If you bring in a verdict for plaintiff in this case you should not, in arriving at the amount of the verdict, resort to the so-called pooling plan or scheme. That scheme is for each juror to write down the amount he or she thinks should be awarded, then add up the total and divide by twelve and thus fix the amount of the verdict. Your verdict should be based upon the evidence and not upon the element of chance.

Now, I have given you instructions on the question of damages in this case. I have not intended by giving these instructions to indicate the amount of damages, if any, that you should award. I have given you the instructions as to damages because it is the duty of the court to instruct the jury as to the law on all phases of the case.

I wish to finally caution you that if it becomes necessary for the jury to communicate with the court during its deliberations, or upon its return into court, respecting any matter touching the trial of this case, you should not indicate to the court in any manner how the jury stands numerically, or other- [55] wise, on the issue submitted. This caution the jury should observe at all times after the case is submitted to it and until the jury has reached a verdict.

Whenever all of you agree to a verdict, it is the verdict of the jury. In other words, your verdict must be unanimous.

When you retire to the jury room to deliberate, you will select one of your number as foreman or forelady, and he or she will sign your verdict for you when it has been agreed upon, and he or she will represent you as your spokesman in the further conduct of this case in this court.

Do either counsel wish to note any exceptions?

Mr. Brunner: Yes.

Mr. Reagh: Yes.

(Thereupon the jury retired and exceptions were noted.)

The Court: The plaintiff may note any exceptions.

Mr. Brunner: Plaintiff, if your Honor please, wishes to take exception to the court's refusal to give Instruction No. 9; that is the one as to good faith.

The Court: The Court believes it sufficiently covered the matter in the instructions and the exception will be noted.

Mr. Brunner: Likewise Instruction No. 12, that is the instruction on damages. Also Instruction No. 13, so far as it was given. Your Honor gave the last sentence of Instruction No. 13.

The Court: Yes. All exceptions may be noted and overruled. [56]

Mr. Reagh: The defendant, your Honor, respectfully excepts to the charge of the Court to the jury as a whole, and particularly in the following particulars: First, that from the charge as a whole the jury would be led to believe they were

compelled to bring in a verdict for at least the actual amount of the proven overcharges unless the defense that has been referred to throughout the trial as the Candler defense was established.

The Court: The exception will be noted. I wish to call your attention to the fact that that instruction was favorable to the defendant, because under the language of the statute \$25 could be awarded for every overcharge; if I had instructed the jury they could do that the verdict could be very much larger than the actual overcharges in this case.

Mr. Reagh: The defendant further excepts to that portion of the Court's charge concerning the pre-trial order and the failure of the defendant to point to any item in Exhibit No. 1 constitutes any admission whatsoever on the part of the defendant. Further, the defendant excepts to the charge of the Court concerning the pre-trial order from which the jury would be authorized to infer that from the court's instructions as to the pre-trial order that any money was ever received by defendant on any of the transactions set forth in Exhibit 1, or that any consideration ever passed to the defendant as a result of any of the transactions set forth in Exhibit 1, or that any meat, whatsoever, was delivered to any person in Exhibit 1, or that [57] any of the purchases in Exhibit 1 was made, or that the failure of the defendant to point out grades in Exhibit 1 indicated an admission on his part that any particular person therein listed was himself unable to have brought the

action, in whose behalf the Administrator proceeds. May I have an exception?

The Court: You are arguing the matter now. The exception may be noted.

Mr. Reagh: The defendant further excepts to the statement of the court's opinion that an overcharge in the sum of \$4134.07, or any other overcharge, was proved by Exhibit 1.

The Court: You may have an exception.

Mr. Reagh: Further, the defendant excepts to that portion of your Honor's charge which in effect told the jury that under this particular law the defendant was bound by the acts of his agent.

The Court: You may have an exception.

Mr. Reagh: The defendant further excepts to that portion of the Court's charge in which the Court stated in effect that it was the duty, absolute duty of the defendant to conduct its business in accordance with the price regulations.

The Court: You may have an exception.

Mr. Reagh: The defendant excepts to the failure of the Court to instruct the jury that it was incumbent upon the plaintiff to prove that the defendant had received money or consideration for the sale of meat described and set forth in Exhibit [58] No. 1, and the failure of the court to instruct the jury that it was incumbent upon the plaintiff to prove the purchases in the course of the transactions.

The defendant further respectfully excepts to the Court's refusal to charge that the presumption of innocence applies to the defendant.

The defendant further excepts to the Court's refusal to charge the jury that the law presumes honesty and fair dealing in transactions in complying with the law.

The defendant also excepts to the Court's refusal to give proposed instruction No. 15 and proposed instruction Nos. 16 and 17.

The Court: You have already covered that. All of the exceptions are noted and overruled. Bring the jury back.

(Thereupon the jury was returned into court.)

The Court: Let the record show that all of the jurors are present.

Ladies and Gentlemen of the Jury: The Court has concluded its instructions to you.

The clerk has prepared forms of verdict for you, merely for your convenience. Let me say to you, because these forms have been prepared does not mean that you are to render a verdict one way or the other as indicated by the form of the verdict. These forms are merely provided for your convenience, for you to fill out when you have arrived at a verdict. You may take [59] the exhibits with you to the jury room as well as the forms of verdict for your convenience.

The jury may now retire and deliberate upon your verdict.

(Thereupon the jury retired and thereafter returned into court with a verdict in favor of the plaintiff in the sum of \$4,634.07.)

[Endorsed]: No. 11034. United States Circuit Court of Appeals for the Ninth Circuit. A. N. McDonald, Appellant, vs. Chester Bowles, Administrator, Office of Price Administration, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed April 11, 1945.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11,034

A. N. McDONALD,

Appellant,

v.

CHESTER BOWLES, Administrator, etc.,

Appellee.

STATEMENT OF POINTS RELIED ON BY
APPELLANT AND DESIGNATION OF
RECORD.

On this appeal the appellant will rely on the following points:

1. There was no evidence of any sale by the defendant; nor any evidence to support any claim

for damages resulting from any sale of provisions by the defendant.

2. There was no evidence to warrant the issuance of any injunction.

3. The pre-trial order infringed the defendant's rights under the VIth and XVIth Amendments of the Constitution of the United States.

4. The court erred in admitting Plaintiff's Exhibit 1 into evidence.

5. The court erred in denying the defendant's motion for a directed verdict at the close of the case.

6. The court erred in charging the jury, as pointed out in the defendant's exceptions.

7. The court erred in failing to charge the jury, as pointed out in the defendant's exceptions.

8. The court erred in denying defendant's motion for judgment notwithstanding verdict.

9. The court erred in denying defendant's motion for a new trial.

Properly to present the above points the appellant designates the entire transcript, except Plaintiff's Exhibit 1, as necessary to be printed herein.

CHARLES REAGH,
Attorney for Appellant.

The receipt of a copy of the above and foregoing Statement and Designation is hereby acknowledged, this 20th day of April, 1945.

W. H. BRUNNER,
JOSEPH E. TINNEY,
Attorneys for Appellee.

[Endorsed]: Filed Apr. 20, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION CONCERNING EXHIBIT
No. ONE

It is hereby stipulated that the Clerk of this Court need not print Plaintiff's Exhibit No. 1, in the court below, but that the same may be considered by this court to the same extent as though it had been so printed.

CHARLES REAGH,
Attorney for Appellant.
W. H. BRUNNER,
JOSEPH E. TINNEY,
Attorneys for Appellee.

[Endorsed]: Filed Apr. 20, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER CONCERNING PRINTING
OF TRANSCRIPT.

The parties hereto having by stipulation so agreed, it is now by the court

Ordered: That in printing the transcript herein the Clerk omit Exhibit No. 1 in the court below, but that the said exhibit may be considered by the court on this appeal as fully as though printed.

Dated: April 26, 1945.

CURTIS D. WILBUR,

Senior U. S. Circuit Judge.

[Endorsed]: Filed Apr. 26, 1945. Paul P. O'Brien, Clerk.

No. 11,034

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

A. N. McDONALD,

Appellant,

VS.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellee.

APPELLANT'S OPENING BRIEF.

CHARLES REAGH,

995 Market Street, San Francisco 3,

Attorney for Appellant.

FILED

SEP 11 1945

PAUL P. O'BRIEN,
CLERK

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No. 11,034

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

A. N. McDONALD,

Appellant,

VS.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellee.

APPELLANT'S OPENING BRIEF.

NATURE OF THIS APPEAL.

A. N. McDonald seeks review and reversal of a judgment of the District Court for the Northern District of California, Hon. Louis E. Goodman, Judge, in a combined equity and common law suit for injunction and damages brought by appellee under the powers conferred by the Emergency Price Control Act. The matter on the law side was tried before Court and jury and resulted in a verdict against Mr. McDonald in the sum of \$4,634.07. On this verdict judgment was entered and on the same evidence an injunction was granted the Administrator. Motions for new trial and for judgment *non obstante* were denied and the appeal brings the case here.

JURISDICTION.

No question of jurisdiction was, or could be involved, because the Emergency Price Control Act of 1942, Public Law 421—77th Congress expressly confers jurisdiction by subsection c of Section 205 thereof.

STATEMENT OF THE CASE.

A. N. McDonald was engaged in the sale of meats in the city of Oakland. His business was a fairly large one as to volume in normal times, employing seven and eight persons. (Trans. 67.) It consisted in supplying meat to restaurants, boarding houses and the like. There was a small retail business in the store but this did less than 15 per cent of the total. (Trans. 16.) It was, however, as to management, a one-man business.

In May, 1942, Mr. McDonald fell sick and his doctor advised him to get a rest. He accordingly left San Francisco on May 18th to go to Montreal, his former home. At the time of leaving he expected to be gone about two or three weeks. However, at Montreal, a serious illness supervened and he did not return until the 19th of July. (Trans. 66.)

All the alleged violations of the price control act involved in this suit took place during that time. (Pltf's Exhibit 1, Trans. 95.)

When Mr. McDonald left he had a man in the wholesale department; Mr. Finke, a trusted employee with whom he had contemplated partnership, though that

deal had fallen through; and one man in the retail side of the store. Mrs. McDonald, in the emergency, took charge of the store. She had no knowledge of meats and grading. During Mr. McDonald's absence two men were drafted and the substitute for one proved to be so given to "celebrating" that he could not be depended on. (Trans. 67.)

In addition to her duties at the store, Mrs. McDonald had to do all the housework at her home. She has two daughters, one aged ten, and one sixteen, the latter unable by reason of illness to aid in the work at home. (Trans. 68.)

During her time of running the business Mr. Finke worked as much as eighteen and twenty hours a day, trying to get out the orders. Mrs. McDonald did billing and bookkeeping and also helped to put up orders. (Trans. 71.)

A printed list was posted in the place when Mr. McDonald left, giving the prices for various grades. The O. P. A. authorities came in there and made no complaint. (Trans. 72.) Mrs. McDonald followed the prices on this list. The record does not show whether this list was furnished by the Office of Price Administration or by the Butcher's Association but Mr. McDonald told his wife to follow that list and she tried her best to do so. Her own sales were graded by Mr. Finke as she had herself no knowledge of grades. (Trans. 71.)

At some undetermined time, officers of the appellee secured from the bookkeeper of Mr. McDonald all

the *sales slips* for the month of June, 1943. (Trans. 34.) From this a transcription in lead pencil was made and this transcription appears in evidence as Exhibit 1. (Trans. 95.)

By a pre-trial order, this document was handed to counsel for appellant, who was ruled as follows:

“3. That plaintiff deliver to defendant or his counsel for critical examination the transcript prepared by investigators of the Office of Price Administration from the invoices and records of said defendant A. N. McDonald for the period of June 1, 1943, to July 3, 1943 inclusive, which transcript shows not only the facts appearing upon the face of said invoices but also a listing of the proper ceiling price applicable to each sale and the determination of the overcharge alleged with reference to each sale. That defendant, after such critical examination of said transcript, indicate in writing to plaintiff by specifications of objection the particulars wherein he claims that such transcript does not state the true facts applying to each sale, or the proper maximum price at which each sale exceeds the maximum lawful price which defendant could have charged in making such sale. That if no objection be made or specifications of objection be furnished by defendant as hereinabove permitted, it be considered by this Court for the purposes of this action that each item set forth in said transcript is true, accurate and correct as to the description of said item sold, the price charged, the applicable lawful maximum price, and the amount of overcharge, if any. That if objection be made and specifications of objection be furnished by defendant, and not be reconciled by

agreement between the parties hereto, the issues so joined by such objection and specifications of objection be tendered for determination at the trial of said action.

4. That issues in said action be limited as hereinabove set forth and as so limited that this Pre-Trial Order and the objections and specifications of objection as permitted hereunder be considered a complete statement of all matters in dispute between the parties to this action. That this Pre-Trial Order shall not be amended except with the consent of the parties or at the discretion of the Court to prevent manifest injustice in accordance with Rule 16 of the Federal Rules of Civil Procedure.”

At the trial, this penciled document was offered and received in evidence as Exhibit No. 1 over defendant's objection. The defendant, through his counsel, refused to review the document and offer any criticism of the items thereof.

Except for this document, supported by testimony of agents of the Administrator that it was a transcript of a *copy* of sales records received from the bookkeeper of McDonald & Finke, there was virtually no evidence on the part of the plaintiff.

(One witness testified that he followed grades through several sales, but those sales were trivial in amount and no pretense was made that more than a fraction of grades were thus checked.)

There was no proof, other than this transcript of a *copy* of sales slips (Trans. 35) that any meat had been

delivered under the original sales invoices; that anyone had agreed to pay the prices shown on such invoices for the merchandise covered thereby; that any of the persons listed were buying for re-sale or for other than their own use and consumption; that any of the supposed purchasers had ever paid anything under the items shown by the supposed transcript of the *copy* of the sales invoices.

At the close of the plaintiff's evidence and again at the close of the entire evidence, the defendant moved for a directed verdict, calling the Court's attention specifically to the above lack of evidence. (Trans. 59, 75.) Each motion was denied. Motion for judgment notwithstanding the verdict was denied. (Trans. 18.)

Defendant preserved exceptions to the judge's charge to the jury as a whole and to the court's failure to charge the jury that the presumption of innocence applied and that the presumption of honesty and fair dealing applied in favor of the defendant; and also preserved exceptions to the statement of the Court's opinion that overcharge in the sum of \$4134.07 was proved by Exhibit 1; that the defendant's refusal to point out discrepancies in Exhibit 1 indicated an admission on his part that any particular person therein listed was himself unable to have brought action for overcharge; and also to the portions of the charge which made it the absolute duty of the defendant to conduct his business in accordance with price regulations; and that part of the charge which told the jury that, as far as the Chand-

ler defense was concerned, the defendant was bound by the acts of his agents. (Trans. 89, 90, 91, 92.)

The verdict of the jury was in favor of the Administrator in the sum of \$4634.07. (Trans. 18.) Judgment followed the overruling of defendant's motions for judgment n. o. v. and for a new trial. (Trans. 19.)

On the same evidence and no other, an injunction was granted the Administrator. (Trans. 24.) The findings merely were to the effect that everything alleged in the complaint except in paragraphs 2, 3 and 4 of count 6 was true. (Trans. 21.)

SPECIFICATION OF ERRORS.

1. The Court erred in requiring the defendant, by pre-trial order, to be deemed to admit all that he did not specify by way of objection to the document afterwards received in evidence as Exhibit 1.

2. The Court erred in admitting Exhibit 1 in evidence, said document being a supposed transcript of a *copy* of sales slips, or invoices, and there being no showing as to who made the copy, furnished by an employee of McDonald & Finke, and in overruling the defendant's objections made to such admission, the same being as follows: (Trans. 36)

“Mr. Brunner. I offer now, if your Honor please, the transcript, which is marked Plaintiff's Exhibit 1 for identification, in evidence.

Mr. Reagh. In this matter, your Honor, as to the portion of the document regarding the ceiling price I take it that is already covered by your

Honor's ruling, and I renew my objection to that. As to the transcript of the transaction involved, I object on behalf of the defendant as immaterial, irrelevant, and incompetent, not the best evidence, no proper foundation having been laid, calling for an opinion and conclusion of the witness on the precise matter in controversy, and as to the duty of the defendant in the pre-trial order to have studied and set forth any discrepancies, I object on the ground that the pre-trial order calls upon the defendant to violate his privilege under the bill of rights, in that the matters and things charged in the complaint could have been made and now are the subject of a criminal prosecution under section 4. I further object on the ground that the defendant was called upon to expose himself to penal punishment by the demand made upon him, under penalty of having made an admission in pointing out anything in this transcript to which he objected. It is improper practice to demand of defendant under penalty of being guilty of an admission that he pointed out particular items and be deemed to have admitted all of the rest——

The Court. I do not want to interrupt you, but you are arguing the matter.

Mr. Reagh. I am trying to save time, I am trying to state my grounds of objection only.

The Court. I do not understand that this transcript is being offered as an admission. Unless I am incorrect the witness testified that this is a correct copy of the records that were furnished him by the defendant. 'The witness' testimony is that it is correct as to the ceiling prices from the data which was assembled from the record of the defendant. Is that correct?

A. Yes.

The Court. Is there anything you wish to add to your objection?

Mr. Reagh. If your Honor please, I have sufficiently stated my grounds of objection; that is all.

The Court. That is up to you. You can state any grounds you wish.

Mr. Reagh. The defendant through his counsel specifically sets up a claim to immunity under the Bill of Rights for being required to furnish testimony against himself, and under the necessity at pre-trial conference of indicating objections or being deemed to admit all else contained in it.

The Court. Inasmuch as there is no question of procedure involved I do not think that there is anything to the objection. It is overruled. The exhibit may be admitted in evidence.

(Plaintiff's Exhibit 1 for Identification was thereupon admitted in evidence.)

3. It was error to overrule appellant's motion for a directed verdict and his subsequent motion for judgment notwithstanding the verdict.

4. The Court erred in refusing to charge the jury that the presumption of innocence applied to the defendant and also in failing to charge the jury that the law presumes honesty and fair dealing in transactions. There was nothing at all in connection with this matter in the charge and specific exceptions were preserved. (Trans. 91.)

5. The Court erred in charging the jury as to the so-called Chandler defense. The entire charge of the Court on the subject was (Trans. 84):

“Now, at the present time under the law it is the opinion of the court, and I so instruct you, that so far as any damages are concerned in excess of actual overcharges, if the defendant had not proved to you by a preponderance of the evidence that the violations of the Price regulations were neither wilful nor the result of failure to take practicable precautions against the occurrence of violations, you have the discretion of determining how much damages may be awarded over and above the actual overcharges, but not to exceed three times the amount of such overcharges.”

* * * * *

(Trans. 86.)

“Now, I have already called your attention, Ladies and Gentlemen of the Jury, to a special defense which the defendant has urged. The defendant, by his counsel, has argued to you that the evidence in this case shows that you should not award damages above the overcharges, because the evidence shows, as contended by the defendant, that the defendant did not act wilfully nor did the violations result from a failure to take practicable precautions against the occurrence of the violations.

I wish to advise you that the term ‘wilful’ as used in the statute means purposely or obstinately. It is designed to describe the attitude of a person who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to the requirements.

'Practicable precautions' as used in the statute are those precautions that would be adopted and safeguards that would be maintained by a reasonably prudent business man under all of the circumstances to prevent and guard against his violating price regulations or schedules applying to his business.

An employer or a principal who entrusts the conduct of his business of part of his business to employees or agents is, under general principles of law, bound by the acts of the employees in the regular scope of the employment.

It is for you to determine under the facts and circumstances in this case whether or not the defendant has proved by a preponderance of the evidence that the defendant's violations of the price schedules, if you find that there were such violations, were not wilful and not the result of failure to take practicable precautions to prevent and guard against the occurrence of violations.

It is defendant's duty to inform himself of price regulations and schedules issued by the Price Administrator affecting his business, and it is his duty to conduct his business in such a manner as to prevent violations of such regulations.

Now, Ladies and Gentlemen of the Jury, I think that is a fair and proper statement of the law applicable to this particular charge."

(a) Such charge erred in telling the jury that it was the absolute "duty (of the defendant) to inform himself of price regulations and schedules issued by the Price Administrator and * * * to conduct his

business in such a manner as to prevent violations of such regulations”.

(b) Such charge erroneously stated that the defendant was “under general principles of law, bound by the acts of his employees in the regular scope of the employment”.

6. The Court erred in instructing the jury that in the Court’s opinion, Exhibit No. 1, “plus the testimony of the witnesses produced by plaintiff, establishing (sic establishes), the fact that overcharges in the total sum of \$4134.70 were made by the defendant”. (Trans. 85.) Defendant specifically excepted to this. (Trans. 91.)

7. There was no evidence to warrant an injunction and none should have been granted the Administrator.

ARGUMENT.

I.

By the pre-trial order, under the guise of limiting the issues, the Court required the defendant to furnish the plaintiff with a bill of particulars, under penalty of having a penalty assessed against him. This was against the objections of the defendant, who noted his exceptions to the order. (Trans. 17.)

(a) Rule 16 of the District Court Rules does not permit such a practice. The precise words under which such a procedure must be justified, if at all, are

“The court shall make an order which recites the action taken at the conference, * * * the agreements made by the parties as to any of the matters considered, *and which limit the issues for trial to those not disposed of by admissions or agreements of counsel.*”

Here there is no pretense that there were any admissions or agreements of counsel—on the contrary, objections and exceptions. No case appears in the digests where any such power has before been claimed.

(b) The adjective features of the Price Control Act are penal, rather than remedial. We are aware that, so far as appears from reference works at this date, no Circuit Court of Appeals has decided this proposition and but one District Court case seems reported.

In *Bowles v. Troubridge*, 60 Fed. Supp. 48, the opinion of Judge St. Sure of this district reviews the law on the subject and reaches the conclusion stated above.

Indeed, if this statute be considered remedial, perhaps some one will have the goodness to give an example of a penal statute. If the statute be a remedial one, how can the provisions concerning costs and attorney's fees be valid. Costs and attorney's fees are, by this act, allowed to the Administrator if he be successful and are denied to the defendant if the action fail. The parties do not start equal. As a penal statute, there can be no objection to such a course. But if remedial, the statute denies the equal protection of the laws.

(c) By the pre-trial order, the defendant was required, in effect, to furnish evidence against the salutary rule of the Constitution forbidding a requirement of self-incrimination.

The rule in question applies not only to criminal cases but also and with equal force to cases wherein the defendant will be exposed to a penalty or forfeiture. (*Boyd v. United States*, 116 U. S. 616-631, 29 Law. Ed. 746.) And see, *U. S. v. White*, 137 Fed. (2d) 34.

(d) The pre-trial order is objectionable for another reason, namely, that it amounts to a prejudgment of the entire case. The Court finds that "the transcript shows not only the facts appearing upon the face of said invoices but also a listing of the proper ceiling price".

II.

Exhibit 1 was a transcript of a *copy*, made by an unknown and unidentified person, of sales invoices, furnished by the bookkeeper of McDonald & Finke to the Administrator's agents. It was offered in evidence and admitted over objection that it was not the best evidence and that no proper foundation for its reception had been made.

There was no showing that any notice to the defendant to produce originals had been made. To authorize secondary evidence, such a showing is requisite (*Myrick v. U. S.*, 219 Fed. 1) unless the originals are

shown to have been lost, mislaid, or the like. (*Burton v. Driggs*, 20 Wall. 125, 22 Law. Ed. 299.)

For this reason alone the exhibit should have been refused admission. Unquestionably an abstract of lengthy books of account, etc, is admissible, but we contend that this is true only when it is shown that the books from which the abstract is made would have been admissible in the first place. There was no showing at all as to who made the original invoices or the copies from which the transcript was made, nor as to the authority of the bookkeeper of McDonald & Finke to keep the records of defendant, and the evidence showed that at the time of the transactions in question there was no bookkeeper. (Trans. 67.)

We understand that the other objections made to this exhibit have been recently considered by this Court and adversely to our contention. It would be an idle act to reargue them. We do not abandon these contentions nor concede any lack of force to them. The writer merely assumes that extended observations on this subject would burden the Court uselessly.

III

At the close of the plaintiff's evidence and again at the close of all the evidence, the defendant called the attention of the Court to the fact that there was no proof whatever that any of the merchandise covered

by Exhibit 1 had ever been paid for or delivered; that on its face the exhibit purported to be only a transcript of invoices made to accompany deliveries, none marked COD or "Paid" so far as shown. Motion for a directed verdict on this ground was denied.

It was and is the defendant's claim that payment is a pre-requisite to injury; that until an over-charge has eventuated in a payment, no one is injured; that Congress could not have intended to give quadruple damages to a man who had suffered no injury; and that proof of this essential of the cause of action should be made in this class of case the same as in any other.

Of course, mere rescission of a completed transaction would not avoid the penalty. On that everyone must necessarily agree. But until payment has been made there is simply nothing to rescind, absent at least proof that the buyer had agreed on an excessive price, there being no such proof in this case.

By the terms of the Act, the *payment* of receipt of rent is made the selling of a commodity. (Section 205, sub-section e.)

To hold that a mere mis-billing would give rise to a cause of action would stretch the Act beyond any possible sense. A man who had paid nothing would recover one and one-half more than a man who had paid in full. (Suppose the bill called for \$2.00 more than the proper price. The man who refused to pay would recover \$6.00. The man who had paid would recover \$6.00. But the latter would be getting back \$2.00 which he never, in contemplation of law, should

have paid. His net gain would be \$4.00. This would be truly a marvelous result for a "remedial" law.)

When the attention of the Court was drawn to the condition of Exhibit 1, really the sole evidence in the case on the part of the plaintiff, on the motion for directed verdict, His Honor merely remarked:

"Why didn't you go into those matters and examine the witness who made the statement" * * * If you had wanted to attack that, you could have cross-examined the witness and developed matters that go to the credibility and weight of this statement."

Well, the exhibit is here and before the Court and we respectfully ask the Court how a verdict and judgment on such a document, with manifest errors, miscalculations, erasures, uncertainties, can be the basis of any computation herein.

The defendant also preserved the point further by an exception to the charge of the Court. (Trans. 90.)

IV.

The defendant was entitled to the presumption of innocence and to the benefit of the presumption of honesty and fair dealing. These presumptions and their benefits were refused the defendant. We contend that this was error. (The presumptions are not identical but we present them under a single specification of error because of their cognate character.)

Cincinnati R. Co. v. Rankin, 241 U. S. 319, 36 Sup. Ct. 555, 60 Law. Ed. 1022;

Alexander v. Fidelity Trust Co., 249 Fed. 1;
Drown v. New Amsterdam Cas. Co., 175 Cal.
 21, 165 Pac. 5;
Moses v. U. S., 166 U. S. 571, 17 Sup. Ct. 682,
 41 Law. Ed. 1119;
Fisher v. McInerney, 137 Cal. 28, 69 Pac. 622.

V.

The charge of the Court concerning the so-called Chandler defense was misleading and unfair to the defendant. Virtually the charge deprived the defendant of the Chandler defense. To lay on a defendant the liability for all acts of his employees and an absolute duty to be informed and to regulate his business at all events to obey the price regulations is to make a mock of the exception which Congress grafted on the law and expressly made applicable to pending litigation.

The mere fact that all that was said was abstractly correct, does not save the error.

Otis v. Pittsburg, etc. Co., 220 Fed. 595;
Cincinnati T. Co. v. Roebusch, 192 Fed. 520.

In a narrow and technical sense, perhaps each item in this charge was correct. Nonetheless, in sum it lays on the defendant an absolute duty to avoid any violation of the price regulations. The Court does not qualify the duty in any way. It is made defendant's duty to inform himself of the price regulations and his duty to conduct his business in such a way as to prevent violations of those regulations.

A defendant lying sick 3000 miles away, unable even to write, with a wife inexperienced in business essaying her best to keep food moving to wartime workers, short-handed, with his only trustworthy employee working to and beyond the limits of human capacity, on him is placed the "duty to inform himself of price regulations" and "conduct his business in such a manner as to prevent violations of such regulations."

As phrased, the charge was ambiguous and unfair. That it exercised an unwarranted influence on the jury is demonstrated by the fact that they found a verdict in excess of the *claimed* overcharges when the evidence supporting the Chandler defense was overwhelming.

We offer specific criticism of that part of the charge quoted just above which told the jury that the defendant was "bound by the acts of the employees in the regular scope of the employment".

The very purpose of the Chandler proviso was to aid a master whose efforts to obey the law had been thwarted by the mistake or failure of an employee. If the rule "respondeat superior" be rigidly enforced, the Chandler defense is gone. How else could "practicable precautions" to obey the law fail than by the default or neglect of an employee or agent?

VI.

The Court expressed to the jury an opinion that Exhibit 1, plus the testimony of the witnesses, "estab-

lishing (establishes) the fact that overcharges in the sum of \$4,134.70 were made by the defendant.”

This part of the charge could be valid only if there was evidence that an overcharge in some amount had been made and if, on the face of Exhibit 1, the amount of the Court’s computation were correct. The Court has the right to express an opinion in instructing the jury but the opinion must not be arbitrary.

The exhibit speaks for itself. We have already argued the question as to whether or not proof of payment was required. If such proof was requisite, this charge was error.

VII.

Even if the evidence had shown a liability of the defendant for damages to the extent of the overcharge, under the circumstances of this case, no injunction was warranted. (The fact that the defendant is no longer in business, the attempt to comply with O. P. A. regulations and to fight the black market practices which those regulations have notoriously fostered having proved too much for him, we consider immaterial because, theoretically at least, he may want to go back into business before O. P. A. goes out.)

The sole violations were demonstrated to have occurred, if at all, while the defendant lay sick at Montreal and the officers of the Administrator knew this. (Trans. 40.) The record shows no charge against the defendant except during that emergency. As soon as

he resumes the charge of his business all criticism ceases. The action was filed August 23, 1943. By a supplemental complaint, any act of the defendant after July 19, 1943, could easily have been brought into the case. Moreover, if such act had been available, evidence thereof would have been admissible to prove intent and the necessity for an injunction. There was no such supplemental complaint and no such evidence.

We submit that the discretion of the court was abused in this case.

CONCLUSION.

The circumstances of this case smack far too much of oppression to justify any very narrow view of the law. The defendant certainly should be held bound to obey the law but there was no reason to stretch matters to the extent of depriving him of any legal right on the theory that a guilty man has no rights anyway. If guilty, his guilt was but a technical one. And a man accused of only a technical violation of law has the right to strict technical rules when he is being tried on such a case. He must be mulcted under all the forms of law.

We respectfully submit that the case should be sent down for a new trial.

Dated, San Francisco,
September 7, 1945.

CHARLES REAGH,
Attorney for Appellant.

No. 11034

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

A. N. McDONALD, APPELLANT

v.

**CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, APPELLEE**

**UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION**

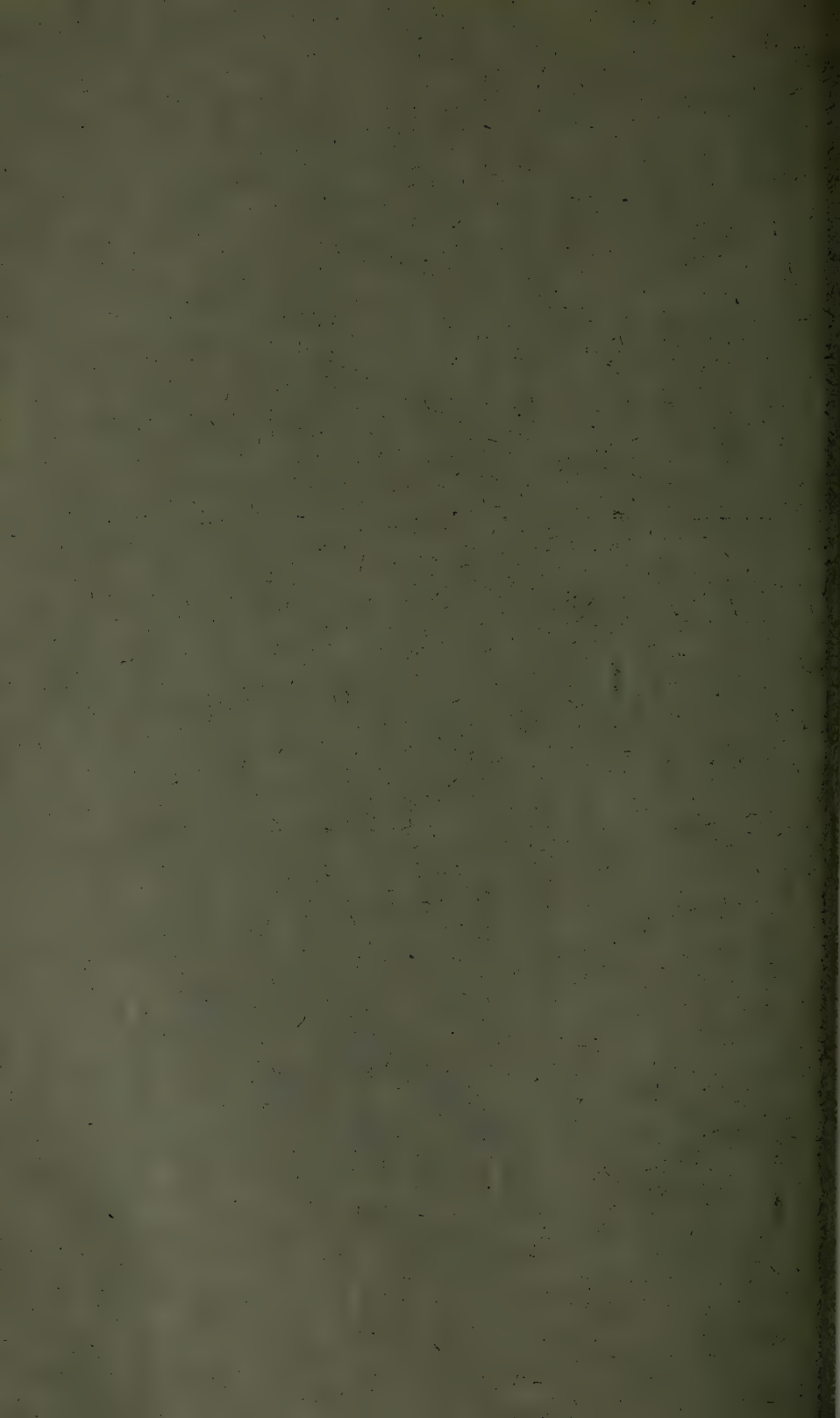
APPELLEE'S BRIEF

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11034

A. N. McDONALD, APPELLANT

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, APPELLEE

*UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION*

APPELLEE'S BRIEF

JURISDICTION

This is an appeal from a final judgment (R. 19) in an action brought by the Price Administrator pursuant to sections 205 (a) and 205 (e) of the Emergency Price Control Act (50 U. S. Code App. Section 925, 56 Stat. 23) for an injunction and treble damages.¹ Jurisdiction of the District Court was in-

¹ The money judgment was entered on September 5, 1944 (R. 20). The injunctive decree (R. 24-26) was entered on September 8, 1944. Appellant's notice of appeal (R. 28) specifies only the judgment entered on September 5th. Mention of the decree does appear in appellant's Statement of Points relied on and Designation (R. 93-94), and the validity of the injunction is argued by appellant on this appeal.

voked under section 205 (c) of the Act, and jurisdiction of this Court is invoked under sections 128 and 129 of the Judicial Code (28 U. S. Code, section 225, 227).

STATEMENT OF THE CASE

The complaint for injunction and treble damages was in seven counts (R. 2-13). It charged appellant with selling meats at prices in excess of the ceilings established by Revised Maximum Price Regulation No. 169, as amended—Beef and Veal Carcasses and wholesale cuts (7 Fed. Reg. 10381) (R. 2-3); Revised Maximum Price Regulation No. 239, as amended—Lamb and Mutton Carcasses, and cuts at wholesale and retail (7 Fed. Reg. 10688 (R. 3-4); Revised Maximum Price Regulation No. 148, as amended—Dressed Hogs and wholesale Pork cuts (7 Fed. Reg. 8609) (R. 4); Maximum Price Regulation No. 389, as amended—Ceiling Prices for Certain Sausage Items at wholesale (8 Fed. Reg. 5903) (R. 4-5); and Maximum Price Regulation No. 398—Variety Meats and Edible By-Products at wholesale (8 Fed. Reg. 6945) (R. 5-16), and in failing to file and keep records in accordance with the requirements of the regulations (R. 6-9). The complaint prayed for recovery of treble damages (R. 9-11) and for injunctive relief against further violations of the applicable regulations (R. 11-13). Suit was originally instituted against A. N. McDonald and W. O. Finke, individually and as copartners (R. 2). By Pre-Trial Order (R. 15) the action against W. O. Finke was dismissed upon the ground that he was an employee of McDonald, and not his

partner. The appellant's answer conceded jurisdiction, denied all other allegations of the complaint, and pleaded failure to state a claim (R. 14).

At the trial, appellee produced Ollis W. Newman, an investigator in the Office of Price Administration (R. 34), who testified that he had examined the sales records of the appellant for the month of June 1943 (R. 34); that he had transcribed these records (R. 35); that the transcription² was made under his direction (R. 35); some of it was in his handwriting (R. 35); and that he had checked the ceiling prices that appeared on the transcript (R. 35). He testified further that in computing ceiling prices, he had taken into consideration the grade (R. 55); and that he had followed out a large part of the invoices to destination (R. 57). Albert L. Learney testified that he was a Price Specialist in the Office of Price Administration (R. 39); that he specialized in the regulations governing the sales of meat (R. 39); that he had examined the transcript (Plaintiff's Exhibit 1), checked the ceiling prices stated there against the applicable regulations (R. 42), and that he found no errors (R. 43).

Appellant offered only one witness at the trial, Mary E. McDonald, appellant's wife (R. 66).³ She testified that during her husband's absence from the business, she was in charge (R. 66), and worked there

² Plaintiff's Exhibit 1, covering the month of June 1943, contained approximately 1,500 different items of overcharges. The total overcharges amounted to \$4,134.70.

³ No explanation was offered for the failure to call Finke, the bookkeeper, or other employees. Appellant did not testify.

(R. 68). Her husband had not instructed her to sell meat at other than ceiling prices; he told her "to try to follow the bills or the pamphlets or whatever it was that came out from the OPA, or from the Butchers Union, whatever they were" (R. 69). He told her to follow "a pamphlet that came" as "closely as I could and do the best I could, * * * " (R. 69). She was not a butcher by trade, and had no knowledge of grading meat (R. 69). Although she carried on the bookkeeping and billing end of the business, she did not remember ever checking for grade under the regulations (R. 72). The business supplied shipyard restaurants, schools, hotels, and colleges (R. 72). She was not adding anything on to the prices "except what you are allowed for delivery and for overhead charges and things like that," just "the ordinary margin of profit" (R. 73). She never inquired at the Office of Price Administration concerning proper prices; "when Mr. McDonald came back he had me go over and look over things" (R. 73). She followed a list that Mr. Finke told her to follow "so many times at so much, whatever it was" (R. 74), but "Mr. Finke was not any too well, himself; he was working hard, and he said he was not taking any responsibility" (R. 74).

The jury returned a verdict in the sum of \$4,634.07 (R. 92). Judgment was entered thereon September 5, 1944 (R. 19). Findings of fact and conclusions of law were filed September 8, 1944 (R. 21-23), and the injunctive decree entered September 8, 1944 (R. 24-26). Notice of appeal was filed December 15, 1944 (R. 28).

ARGUMENT

I

The verdict of the jury, based upon competent and overwhelming proof of liability and upon appropriate instructions by the District Court, should not be disturbed. The injunctive decree was properly issued.

A. The argument concerning the pre-trial order

The appellant contends that the pre-trial order (R. 15-17) was improvidently granted, and, in addition, deprived him of guaranteed constitutional privileges. Appellant apparently does not object to the first part of the order (R. 15) which dismissed the action against Finke, nor did appellant in his exception to the order state any constitutional objection (R. 17).

1. In any event, appellant errs as to the scope of Rule 16 of the Federal Rules of Civil Procedure (28 U. S. Code following Section 723 c) governing pre-trial procedure. Among the elements appropriate for consideration at a pre-trial conference under Rule 16 are: "(1) The simplification of the issues; * * * ; (6) Such other matters as may aid in the disposition of the action." The Courts have indicated ample disposition to utilize pre-trial procedure for the simplification of the issues. *Cyclopedia of Federal Procedure* (2nd ed.) Vol. 5, section 1993. "If justice is to be speedy, efficient and inexpensive, justice requires that a party be relieved of the necessity of elaborate preparation upon non-existent issues. Merely because the law places the burden of proof upon one party with respect to a certain issue is no reason for concluding that the other party cannot be asked

whether he seriously intends to raise that issue.” *LaCanin v. Automobile Ins. Co. of Hartford*, 41 F. Supp. 1021, 1022 (D. C. E. D. N. Y., 1941). See, *Yale Transport Corp. v. Yellow Truck & Coach Mfg. Co.*, 3 F. R. D. 440 (D. C. S. D. N. Y., 1944). The pre-trial conference may be termed a “dress rehearsal” of the final trial. Clearly, under such circumstances, an order is not improvidently granted if it directs the plaintiff to furnish to defendant competent documentary evidence in the form of a compilation of defendant’s own records; then requests defendant, in effect, to discredit or impeach any item contained in the document (“specifications of objection”) as he would at a trial, in which event the issues joined would be submitted to the jury; and then directs that those items which are undisputed and not in issue shall be deemed true and accurate. These are procedures common to every trial, civil or criminal.

Moreover, *appellee did not rely on the pre-trial order; he produced all his evidence at the trial. The only effect of the pre-trial order, therefore, was to make Plaintiff’s Exhibit 1 available to the defendant for a period of more than four months before the trial.*

2. It is quite true that no man may be compelled to be a witness against himself, but “sometimes in the progress of a trial the burden of going forward with the evidence may require the accused to produce testimony for himself or suffer an inference of guilt from facts already proven to be drawn against him by the jury” *Bradford v. U. S.*, 130 F. (2d) 630 (C. C. A. 5th, 1942) 129 F. (2d) 274, 278, cert. den. 317 U. S. 683. There was nothing in the pre-

trial order therefore which compelled appellant to testify against himself (and, indeed, he did not). There was no testimonial compulsion of any kind. The only burden placed upon him was to cross-examine, impeach, discredit or in any manner impair the documentary evidence offered by plaintiff at the pre-trial conference. There was no compulsion upon him to admit that the evidence was true. He could have objected to and denied each item in the compilation. As a matter of fact, there was never at any stage of the proceeding any compulsion upon the appellant to testify. He had available the testimony of his wife, Finke, bookkeeper—and the records themselves to refute Plaintiff's Exhibit 1. Appellant chose not to avail himself of these salutary procedures. He cannot be heard to say that by his own inaction he can deprive appellee of the rule of evidence which operates in any civil or criminal trial—that uncontradicted testimony, not incredible in itself, nor impeached nor discredited in any way, to plain and simple facts capable of contradiction, ordinarily must be accepted as true by the trier of the facts. *Alabama Title & Trust Co. v. Millsap*, 71 F. (2d) 518, 520 (C. C. A. 5th, 1934). Appellant may be free from the compulsion to testify; he is not free from the inference which the testimony compels.⁴

⁴ Appellant points to *Boyd v. U. S.*, 116 U. S. 616. There a statute was held unconstitutional which provided that if a defendant failed to produce his private papers after notice from the United States to produce, then the allegations made by the United States concerning such papers should be taken as confessed. Thus, whatever the District Attorney said about the papers, no matter how baseless, would be taken as true. *Boyd v. U. S.*, however, has

Thus, it is universally accepted that legislative presumptions of fact thrusting the burden of explanation upon the accused, do not violate the constitutional clause protecting against "self-incrimination". *Casey v. U. S.*, 276 U. S. 413, 418; *Yee Hem v. U. S.*, 268 U. S. 178, 183; *Luria v. U. S.*, 231 U. S. 9; *Mobile, Jackson & Kansas City R. R. Co. v. Turnipseed*, 219 U. S. 35; *Cases v. U. S.*, 131 F. (2d) 916, 923 (C. C. A. 1st, 1942) cert. den. 319 U. S. 770; *Toy v. U. S.*, 266 Fed. 326, 329 (C. C. A. 2d, 1920) cert. den. 254 U. S. 639; *Gee Woe v. U. S.*, 250 Fed. 428, 429 (C. C. A. 5th, 1918) cert. den. 248 U. S. 562; *Rosenberg v. U. S.*, 13 F. (2) 369, 370 (C. C. A. 9th, 1926). And while an accused's failure to take the stand may not be construed against him, the Court may instruct the jury that such failure to testify did not impair the effect of uncontradicted facts. *Lefkowitz v. U. S.*, 273 Fed. 664, 667 (C. C. A. 2d, 1921) cert. den. 257 U. S. 637; *Jenkins v. U. S.*, 58 F. (2d) 556 (C. C. A. 4th, 1932) cert. den. 287 U. S. 622; *Jamail v. U. S.*, 55 F. (2d) 216, 217 (C. C. A. 5th, 1932); *Robilio v. U. S.*, 291 Fed. 975, 985 (C. C. A. 6th, 1923) cert. den. 263 U. S. 716; *Michael v. U. S.*, 7 F. (2d) 865, 866 (C. C. A. 7th, 1925); *Morrison v. U. S.*, 6 F. (2d) 809, 810 (C. C. A. 8th, 1925); *Sidebotham v. U. S.*, 253 Fed. 417, 421 (C. C. A. 9th, 1918); and even in criminal cases, the rule is that if "a party has it peculiarly within his

nothing to do with the well-settled rule of law that where a defendant voluntarily chooses to abstain from impeaching the testimony of the plaintiff, or to make any explanation in reference thereto; the effect is to concede that there is no issue. See, *Friedman v. U. S.*, 276 Fed. 792, 794 (C. C. A. 2d, 1921); *Grunberg v. U. S.*, 145 Fed. 81, 87 (C. C. A. 1st, 1906).

power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." *Interstate Circuit v. U. S.*, 306 U. S. 208, 225; *Scala v. U. S.*, 54 F. (2d) 608, 610 (C. C. A. 7th, 1931) cert. den. 285 U. S. 554; *U. S. v. Fox*, 97 F. (2d) 913, 915 (C. C. A. 2d, 1938); *Donegan v. U. S.*, 296 Fed. 843, 849 (C. C. A. 5th, 1924), cert. den. 265 U. S. 585.

3. Since the pre-trial order did not compel the appellant to testify within the constitutional intendment, discussion of the nature of the Price Administrator's suit for treble damages is without moment. See U. S. ex rel. *Bilokumsky v. Tod*, 263 U. S. 149, 155; *Speten v. Bowles*, 146 F. (2d) 602, 604 (C. C. A. 8th, 1945) cert. den. 65 S. Ct., 1023.⁵

⁵ Regardless of the validity of the Court's discussion of the nature of the action, *Bowles v. Trowbridge*, 60 F. Supp. 48 (D. C. N. D. Calif., S. D., 1945) does not aid the appellant. In that case the issue involved answers under oath through interrogatories. It is questionable that interrogatories constitute "a direct attempt to compel defendant to testify" (*supra*, 49), "* * * because the answers do not become evidence in the case unless voluntarily introduced by the interrogator * * *" *Coca Cola Co. v. Diri-Cola Laboratories*, 30 F. Supp. 275, 279 (D. C. D. Md., 1939); and, in any event the sweeping objections to the interrogations should not have been sustained for "it is for the tribunal conducting the trial to determine what weight should be given to the contention of the witness that the answer sought will incriminate him" *U. S. ex rel. Vutjauer v. Commissioner of Immigration*, 273 U. S. 103, 113. Indeed, interrogatories concerning records required to be kept by defendant under the Price Control Act would have been clearly permissible. *U. S. v. Austin-Bagley Corp'n.*, 31 F. (2d) 229, 234, (C. C. A. 2d, 1929), cert. den., 279 U. S. 863; *Fishman v. Marcouise*, 32 F. Supp. 460 (D. C. E. D. Pa., 1940).

The appellant also objects to the pre-trial order as constituting pre-judgment because it refers to "proper ceiling price" (Br. 14). But as to that appellant conceded that the Court may take judicial notice (R. 35, 36), and in any event appellant was not harmed because they were amply established at the trial.

B. The argument concerning Appellee's Exhibit 1

Appellee's Exhibit 1 was admissible in evidence *Augustine v. Bowles*, 149 F. (2d) 93 (C. C. A. 9, 1945); *United States v. Deardorff*, 40 F. Supp. 515 (D. C. M. D. Pa., 1941); Wigmore, Evidence (4th ed.) Vol. IV, Section 1230. Since the production of the original documents was not required, and since the exhibit was available for appellant's inspection for more than four months, notice to produce was unnecessary *Stephens v. United States*, 41 F. (2d) 444 (C. C. A. 9th, 1930), cert. den. 282 U. S. 88. Appellant's arguments concerning the making of the original invoices, proof of payment or delivery (See Section 4 (a) of the Act prohibiting offers to sell mis-billing, and other related contentions are without merit. The appellant never questioned the validity of the document, nor did he endeavor to impeach it. That he had ample opportunity is clear from the record (R. 38, 63, 64, 65).

The COURT. You have had an opportunity to go into this matter before the trial and you still have an opportunity to examine the OPA witness to find out whether there is any question about any of these matters.

Mr. REAGH. I would rather not. It is a technical proposition.

The COURT. You simply want to take the position that you do not want to look into those matters?

Mr. REAGH. That is exactly right (R. 64, 65).

Appellee's Exhibit 1, properly in evidence, was *prima facie* true, accurate and correct as to the facts therein set forth. Uncontradicted and unimpeached, the jury was justified in accepting these facts as established, and in drawing all reasonable inferences from them. *Straus v. Victor Talking Machine Co.*, 297 Fed. 791 804 (C. C. A. 2nd, 1924); *Consolidated Gas Co. of New York v. Newton*, 267 Fed. 231, 242 (D. C. S. D. N. Y., 1920) affirmed 258 U. S. 165, 176; *Bingham Mies Co. v. Bianco*, 276 Fed. 513, 519 (C. C. A. 8th, 192); *Walling v. Peary-Wilson Lumber Co.*, 49 F. Sup. 846, 872 (D. C. W. D. La., 1943).

C. The argument concerning the instructions of the Court

The defendant was not entitled to an instruction concerning presumption of innocence or fair dealing. *Lienthal v. United States*, 97 U. S. 237, 265-267; *Hivering v. Mitchell*, 303 U. S. 391, 403. His criticism of the Court's charge concerning appellant's duties under the circumstances of the case is without merit. The appellant was under a duty to inform himself of all applicable price regulations and was legally chargeable with notice of their provisions. *Bowler v. 80 Seventh Ave. Corp.*, 150 F. (2d) 819 C. C. A. 2nd, 145; *Bowler v. Oase*, 4 F. R. D. 403, 404 (D. C. N. D.

Neb., 1945). Wilfulness in violation is not a necessary ingredient in a treble damage suit. *Bowles v. Indianapolis Glove Co.*, 150 F. (2d) 597 (C. C. A. 7th, 1945). An owner's absence from his business will not relieve him of liability for acts committed by his agents to whom he entrusted the conduct of his business. “* * * whatever an agent does or says in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal; and may be proved, as well in a criminal as a civil case, * * *.” *Stockwell v. United States*, 13 Wall. (U. S.) 531, 550; *Bowles v. 870 Seventh Ave. Corp.*, 150 F. (2d) 819, 823 (C. C. A. 2nd, 1945). The objection to the Court's charge on the issue of damages is equally without merit. In view of the state of the record, the Court could well have directed a verdict for the appelle. Indeed, on the issue of overcharges the jury could make no other finding in the light of the uncontradicted testimony. Therefore, the appellant was aided when the Court charged the jury that his opinion as to the amount of the overcharges was not binding upon the jury and that they could come to a different conclusion (R. 85-86).

It is doubtful that appellant's objections to the instructions of the Court are well taken (Rule 51 of the Federal Rules of Civil Procedure, 28 U. S. Code following Section 723c). In any event, since appellee was entitled to judgment and verdict in his favor un-

der the undisputed evidence, any errors in instructions were not prejudicial. Rule 61 of the Federal Rules of Civil Procedure; *Horning v. District of Columbia*, 254 U. S. 135, 138; *Jacobs v. Ivins*, 250 Fed. 431 (C. C. A. 3rd, 1918); *Hamilton Iron & Steel Co. v. Groveland Mining Co.*, 233 Fed. 388, 393 (C. C. A. 6th, 1916); *Chicago Rys. Co. v. Kramer*, 234 Fed. 245, 253 (C. C. A. 7th 1916); *Morgan v. United States*, 98 F. (2d) 473, 477 (C. C. A. 8th, 1938), cert. den. 305 U. S. 648. And a judgment will not be reversed for an error in instruction, where the District Court should have directed a verdict. *Eastern Transportation Line v. Hope*, 95 U. S. 297, 302; *Weidenfeld v. Pacific Import Co.*, 43 F. (2d) 817, 820 (C. C. A. 2nd, 1930) cert. den. 282 U. S. 890; *Aetna Insurance Co. v. C. I. T. Corp.*, 74 F. (2d) 517, 518 (C. C. A. 5th, 1934).

D. The argument concerning the issuance of the injunctive decree.

The jury found against the appellant on the issues of lack of wilfullness and the taking of practicable precautions. Their verdict, and the findings of the Court, were fully justified by the record. It is fair to infer from the testimony that appellant's interest in the price regulations had never been great; it was only quickened after the investigators examined his records (R. 40, 73). Overcharges on approximately 1500 items within a period of one month do not indicate inadvertence or innocent mistake. There was no abuse of discretion in the action of the District Court *Bowles v. Montgomery Ward & Co.*, 143 F. 2d 38

(C. C. A. 7th, 1944); *Bowles v. 870 Seventh Ave. Corp.*, 150 F. (2d) 819 (C. C. A. 2d, 1945).

CONCLUSION

The money judgment and the injunctive decree were fully warranted by the undisputed evidence and should be affirmed.

Respectfully submitted.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,

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San Francisco, California.

No. 11035

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JIM JUNG and MARTY SHERMAN,

Appellants,

vs.

**CHESTER BOWLES, Administrator, Office of Price
Administration,**

Appellee.

TRANSCRIPT OF RECORD

**Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division**

FILED

JUN 20 1945

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Los Angeles 15, Calif. [1*]

In the District Court of the United States
Southern District of California
Central Division

No. 3560-O'C Civil

CHESTER BOWLES, Administrator, Office of Price
Administration,

Plaintiff,

vs.

JIM JUNG, MARTY SHERMAN and MARVIN
BERRY, individually and doing business as VICTORY
PRODUCE COMPANY,

Defendants.

AMENDED COMPLAINT FOR TREBLE
DAMAGES

1. Plaintiff, as Administrator of the Office of Price Administration, brings this action for treble damages on behalf of the United States, pursuant to the provisions of Section 205 (e) of the Emergency Price Control Act of 1942 (Public Law 421, 77th Cong. 2d Sess.. 56 Stat. 23) enacted January 30, 1942, hereinafter called "the Act."

2. Jurisdiction of this action is conferred upon this Court by Section 205 (c) of the Act and by said Section 205 (e) of the Act.

3. At all times mentioned herein there was in effect, pursuant to the Act, Maximum Price Regulation 271, as amended, Certain Perishable Food Commodities, Sales Ex-

cept at Retail, (7 Fed. Reg. 9179) establishing a maximum price for each variety and grade of early white potatoes, 1943 crop. [2]

4. At all times mentioned herein defendants Jim Jung, Marty Sherman and Marvin Berry were copartners doing business as Victory Produce Company, with the principal place of business located at 1124 South San Julian Street, Los Angeles, California, and were intermediate sellers of early white potatoes, selling to other intermediate sellers and retailers within the meaning of the provisions of Section 1351.1003 of Maximum Price Regulation 271, as amended.

5. From and including April 12, 1943, more than six months after the date of approval and enactment of the Act, to and including May 27, 1943, the defendants, and each of them, as intermediate sellers, sold and delivered early white potatoes, 1943 crop, in one hundred pound sacks to wholesalers and retailers. None of said purchases was made for use or consumption other than in the course of trade or business. The defendants, and each of them, demanded and received a price or consideration for the sale of each one hundred pound sack of said early white potatoes, 1943 crop, in excess of the maximum price established for sales of said potatoes by intermediate sellers, under the provisions of Maximum Price Regulation 271, as amended.

6. Three times the aggregate amount by which the price received by the defendants, and each of them, referred to in paragraph 5 above, exceeded the maximum

price provided by Maximum Price Regulation 271, as amended, equals Twenty-Nine Thousand Three Hundred Twenty-Three Dollars and Fifty Cents (\$29,323.50).

Wherefore, Plaintiff demands:

1. Judgment on behalf of the United States against the defendants, and each of them in the sum of Twenty-Nine Thousand Three Hundred Twenty-Three Dollars and Fifty Cents (\$29,323.50);
2. For costs of suit herein; and
3. For such other and further relief as the Court [3] deems just and proper.

Signed at Los Angeles, California, this 13th day of April, 1944.

H. EUGENE BREITENBACH
ROGER E. JOHNSON
STANLEY JEWELL
ARLINE MARTIN

Attorneys for Plaintiff

Office of Price Administration
1031 South Broadway
Los Angeles 15, California

[Endorsed]: Filed Apr. 13, 1944. [4]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Come now the defendants and each of them, in answer to the plaintiff's complaint on file herein, admit, deny and allege as follows:

I.

Answering paragraphs 1, 2, and 3 of plaintiff's complaint, defendants and each of them deny generally and specifically each and every allegation contained therein and the whole thereof.

II.

Answering paragraph 4 of plaintiff's complaint on file herein, deny that they and each of them were intermediate sellers of early white potatoes within the meaning of the provisions of Section 1351.1003 of Maximum Price Regulation 271, as amended. [11]

III.

Answering paragraphs 5 and 6, deny generally and specifically each and every allegation contained therein and the whole thereof.

Wherefore, defendants and each of them pray that plaintiff's complaint on file herein be dismissed, for costs of suit involved herein, and for such other and further relief as to this Court may seem meet and proper in the premises.

LOUIS LERNER.

Attorney for Defendants.

[Verified.]

[Endorsed]: Filed Aug. 24, 1944. [12]

[Title of District Court and Cause.]

H. Eugene Breitenbach, Roger E. Johnson, Stanley Jewell,
Arline Martin, Attorneys for Plaintiff—1031 S.
Broadway, Los Angeles 15, California,

Louis Lerner, Attorney for Defendants, 210 W. 7th St.,
Los Angeles 14, Calif.

O'Connor, J. F. T., Judge.

MEMORANDUM DECISION

The court finds that each and all of the 100-pound sacks of potatoes, as set forth in the plaintiff's exhibit 2, were sold in violation of the ceiling prices as alleged in the amended complaint, and the total overcharges were as set forth in the plaintiff's exhibit 2. The court finds for the defendants for all 50-pound sacks of potatoes as set forth in plaintiff's exhibit 2, as there was no allegation in the amended complaint charging defendants with ceiling price violations in the sale of the 50-pound sacks of potatoes.

There was no evidence introduced to show that the violations of the regulations for price schedule were wilful, or the result of [49] failure to take practical precautions against the occurrence of the violations, and therefore, the amount of the judgment shall be the amount of the overcharges as set forth in plaintiff's exhibit 2.

While three members of the partnership, Jim Jung, Marty Sherman, and Marvin Berry were named defendants individually and as doing business as Victory Produce Company, the record shows Marvin Berry was not personally served. The other two partners were personally served and appeared in the action, answered, and were represented by counsel. Judgment, therefore, will be entered only against the two partners named: Jim Jung and Marty Sherman, and no judgment will be entered against Marvin Berry, who was not served with process.

While counsel for the two defendants against whom judgment is ordered appeared and answered for all of the defendants by stipulation agreeable to the plaintiff, counsel withdrew his appearance for Marvin Berry prior to the trial.

Plaintiff will prepare Findings of Fact, Conclusions of Law, and Judgment in accordance with this memorandum decision, within ten days from the date hereof.

Dated November 14, 1944.

J. F. T. O'CONNOR

Judge

[Endorsed]: Filed Nov. 14, 1944. [50]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on Wednesday, November 1, 1944, before the Honorable J. F. T. O'Connor, judge presiding, sitting without a jury, a jury having been expressly waived, Arline Martin and Wm. U. Handy appearing for Plaintiff and Louis Lerner appearing for Defendants Jim Jung and Marty Sherman individually and doing business as Victory Produce Company, and oral and documentary evidence having been produced and introduced on behalf of both parties and the cause having been submitted, and the Court being fully advised in the premises makes the following:

FINDINGS OF FACT

I.

The allegations contained in Paragraphs 1, 2, 3, 4 and 5 of Plaintiff's complaint are true. [51]

II.

It is true that the exact amount by which the price received by the Defendants and each of them for the sale of early white potatoes, 1943 crop, in one hundred (100) pound sacks to wholesalers and retailers from and including April 12, 1943 to and including May 27, 1943, exceeded the maximum price provided by Maximum Price Regulation 271, as amended, is Eight Thousand Nine Hundred and Sixty-five Dollars and Seventy-eight cents (\$8,965.78).

III.

It is true that the sales of potatoes in excess of the maximum price by Defendants as found in Paragraph II hereof were made by the Defendants in good faith and the Defendants took all practicable precautions to avoid making said sales at prices in excess of the maximum price.

From the foregoing facts the Court makes the following:

CONCLUSIONS OF LAW

I.

Plaintiff is entitled to judgment against the Defendants Jim Jung and Marty Sherman jointly in the sum of Five Thousand Nine Hundred and Seventy-seven Dollars and Eighteen cents (\$5,977.18).

Dated this 14 day of December, 1944.

J. F. T. O'CONNOR

United States District Judge [52]

Received copy of the within Findings of Fact and Conclusions of Law this 24 day of November, 1944. Louis Lerner, by Abraham Goldstein, Attorney for Defendants.

[Endorsed]: Filed Dec. 14, 1944. [53]

In the District Court of the United States
Southern District of California
Central Division

No. 3560-O'C

CHESTER BOWLES, Administrator, Office of Price
Administration,

Plaintiff,

vs.

JIM JUNG, MARTY SHERMAN and MARVIN
BERRY, individually and doing business as VICTORY
PRODUCE COMPANY,

Defendant.

JUDGMENT

The above entitled cause came on regularly for trial on November 1, 1944, in the above entitled Court, before the Honorable J. F. T. O'Connor, judge presiding, sitting without a jury, a jury having been expressly waived. Arline Martin and Wm. U. Handy appearing as attorneys for Plaintiff and Louis Lerner appearing as attorney for Defendants Jim Jung and Marty Sherman, individually and doing business as Victory Produce Company and evidence both oral and documentary having been introduced and the cause submitted for decision and the Court having heretofore made and caused to be filed its written findings of fact and conclusions of law,

It Is Ordered, Adjudged and Decreed that Plaintiff recover from [54] Defendants Jim Jung and Marty Sher-

man jointly, the sum of Five Thousand Nine Hundred and Seventy-seven Dollars and Eighteen cents (\$5,977.18).

Costs taxed at \$40.54.

Dated this 14 day of December, 1944.

J. F. T. O'CONNOR

United States District Judge

Judgment entered Dec. 14, 1944. Docketed Dec. 14, 1944. Book C O 29, page 515. Edmund L. Smith, Clerk, by Francis E. Cross, Deputy. [55]

Received copy of the within Judgment on this 24 day of November, 1944. Louis Lerner, by Abraham Goldstein, Attorney for Defendant.

[Endorsed]: Filed Dec. 14, 1944. [56]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice Is Hereby Given that defendants Jim Jung and Marty Sherman hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on December 14, 1944.

Dated: March 9, 1945.

EDWARD M. RASKIN & LOUIS LERNER

By Edward M. Raskin

Attorneys for Appellants Jim Jung and
Marty Sherman

[Endorsed]: Filed & mailed copy to H. Eugene Breitenbach. Wm. U. Handy, Stanley Jewell, & Arline Martin, plfs. attys- Mar. 9, 1945. [63]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 70 inclusive contain full, true and correct copies of Amended Complaint for Treble Damages; Notice of Motion to Make Complaint More Definite and Certain or for Bill of Particulars; Minute Order Entered July 24, 1944; Answer to Amended Complaint; Plaintiff's Exhibits Nos. 1 and 2; Memorandum Decision; Findings of Fact and Conclusions of Law; Judgment; Notice of Motion for New Trial; Minute Order Entered January 11, 1945; Substitution of Attorneys; Notice of Appeal; Designation of Portions of Record to be Contained in Record on Appeal; Supplemental Designation of Portions of Record to be Contained in Record on Appeal and Undertaking for Costs on Appeal which, together with copy of Reporter's Transcript transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$22.85 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 10th day of April, 1945.

[Seal]

EDMUND L. SMITH,

Clerk

By Theodore Hocke

Chief Deputy Clerk.

[Title of District Court and Cause.]

Before the Honorable J. F. T. O'Connor

REPORTER'S TRANSCRIPT OF
PROCEEDINGS [1*]

Los Angeles, California, Wednesday, November 1,
1944. 10:00 A. M.

Miss Marten: Your Honor, just to bring us up to date on this matter, since the time we discussed it on the pre-trial, we have filed here a cause of action for treble damages, based upon Section 205 (e) of the Emergency Price Control Act, for the sale, in substance, of early white potatoes during the period from April 12, 1943, to May 27, 1943.

Our principal points of issue on the facts involve the question of what was the correct ceiling cost to defendants of the potatoes. In that cost is included the cost of transportation from the point of origin of the potatoes to the defendants' place of business in Los Angeles; that would be from Edison, in Kern County, or Bakersfield, California, to Los Angeles, California. We expect to prove that the ceiling price for trucking potatoes from that area at that time was 18 cents per hundredweight.

The next question of fact is, What is the ceiling price at which defendants can resell potatoes, under the regulations? That price is calculated by the defendants by picking out the net cost of their largest single purchase of each grade of potatoes during the preceding week, and applying the mark-up to which they are entitled to the intermediate sellers, under the regulation, for their profit. So we will be offering evidence this morning showing the

*Page number appearing at top of Reporter's Transcript.

ceiling price of potatoes, the method by which the potatoes [2] are hauled, and evidence of the correct ceiling prices of the defendants for resale of the potatoes, and evidence of the prices at which the potatoes were actually sold.

Mr. Lerner: In order that we understand clearly the evidence which is going to be presented to the Court, I feel that we are at a difference as to exactly what constitutes the issue, and what the evidence is going to prove. The plaintiff, in her opening statement, makes the statement that they are going to show what the maximum price ceiling was, or should have been for the defendants. I might point out, if your Honor please, that the statement itself of the plaintiff's counsel, that they intend to show the price of freight, intend to show the calculated price includes freight, is not in itself in accordance with the maximum price regulation, and before we proceed with the introduction of evidence it is necessary to determine under what provision of the statute we come, and whether or not the calculations or attempted evidence on the part of the plaintiff, are within the regulation to which they are attempting to hold the defendants. Furthermore, I think it should also be clarified as to who are the defendants by whom such sales were made, before we can determine whether or not there was a violation.

The Court: I can't determine those questions until I hear the evidence.

Mr. Lerner: I appreciate that, your Honor. We had [3] that same question come up in the pre-trial. I merely want to make that opening statement so that when objections are raised the Court will understand the purpose for which the objections are being made.

The Court: It is perfectly proper for counsel to make the statement. It protects the record.

GEORGE M. MYERS,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

A. George M. Myers.

Direct Examination

By Miss Marten:

Q. Mr. Myers, what is your occupation?

A. I am rate clerk for the Southern Pacific, in the general freight office, in Los Angeles.

Q. How long have you been employed in that capacity? A. About 20 years.

Q. And do you have with you this morning the tariff or freight rate from Bakersfield, Kern County, to Los Angeles? A. Yes.

Q. Can you tell us what your freight was in April and May, 1943, per car of potatoes, from Bakersfield, Edison, Wasco, and vicinity, to Los Angeles, California?

Mr. Lerner: I object to the question upon the ground [4] that it is immaterial what the freight rates were.

The Court: Overruled. Exception allowed.

Miss Marten: Will you answer the question, Mr. Myers?

A. The rate by rail for that period was constant, and was, from Bakersfield, McKittrick, Arvin, as well as Edison, 15 cents per 100 pounds.

Q. Can you tell us what would be the cost for icing a car of potatoes under Rule 240?

A. Rule 240—I presume you refer to the perishable protective tariff—Rule 240 means initial icing, and no re-icing. The charge there is dependent upon the instruc-

(Testimony of George M. Myers)

tions of the shipper, or the amount of ice to be placed in the bunkers of the car. If his request involves the placing of approximately five and a half tons of ice in the bunkers of the car, the cost of that ice is \$3.05 a ton, which would mean \$20.50 for the ice.

Q. Is there any additional charge per car? A. Yes, sir, the haulage charge is \$7.50.

Q. Which makes a total of \$28.00 to the market?

A. That is incorrect. It should be \$15.77.

Q. Five and a half tons at \$3.05 per ton? A. Yes; plus the hauling charge, would make a total charge of \$24.27 for the icing service.

A. If a car of potatoes contained 450 sacks, weighing 100 pounds each, in addition to the 15 cent freight rate, how much per sack would be added on for icing? [5]

Mr. Lerner: If your Honor please, I am going to object to the hypothetical question, on the ground that no foundation has been laid; no showing that it relates or has any identical comparison with the facts before the Court. Upon the further ground that there have been insufficient facts before the Court to establish a hypothetical case.

Miss Marten: I will withdraw the question. That is all for the plaintiff.

Cross Examination

By Mr. Lerner:

Q. Mr. Myers, what were you reading from? What is that volume you have?

A. The tariff containing freight charges; Southern Pacific tariff 817 e, CPC 3776.

(Testimony of George M. Myers)

Q. Is that the tariff that was in effect on or about April, 1943?

A. The particular rates at issue were effective in this publication October 3, 1941, and are still in effect. There has been no change in the interim.

Q. Do you have any knowledge as to whether or not there were any freight cars available during the two months in question?

A. No, I do not.

Mr. Lerner: No further questions. [6]

RUBEN KUNDERT,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

A. Ruben Kundert.

Direct Examination

By Miss Marten:

Q. What is your address, Mr. Kundert?

A. 1915 18th Street, Bakersfield.

Q. What is your business or occupation?

A. Transportation.

Q. Will you describe that? Are you a trucker?

A. Yes, a trucker.

Q. In April and May, 1943, were you engaged in the trucking business?

A. Yes.

Q. Under what name did you carry on that business?

A. Edison Trucking Company.

Q. For whom did you truck potatoes in April and May, 1943, if you can remember?

A. I trucked for Marvin Berry, Enos Moser, L. A. Potato, and others—a lot of them.

(Testimony of Ruben Kundert)

Q. Referring to the potatoes which you trucked for Marvin Berry, did you have any arrangement with Mr. Berry as to the price for which you would truck potatoes for him? [7]

Mr. Lerner: I object to the question upon the ground that it is immaterial, outside of the issues before this Court. Upon the further ground that no proper foundation has been laid for the introduction of evidence of this type in accordance with the statutes under which the action is brought.

Miss Marten: I will withdraw the question, your Honor.

Q. By Miss Marten: What price did you charge Marvin Berry for the potatoes which you hauled for him in April and May of 1943?

Mr. Lerner: I am going to repeat my objection, upon the same grounds.

Miss Marten: I should like to add the words:—from the Bakersfield area and Edison to Los Angeles, California. A. 30 cents a hundred.

Mr. Lerner: My objection still stands.

The Court: Overruled. Exception allowed.

Q. By Miss Marten: To whom did you deliver the potatoes which you trucked for Marvin Berry from Edison to Los Angeles, California?

A. Victory Produce.

Q. The Victory Produce, where?

A. Here in Los Angeles.

Q. Do you know the address?

A. The Ninth Street market.

Q. Did you haul any potatoes from Edison or Bakersfield [8] areas to Los Angeles, California, in March of 1942? A. No.

(Testimony of Ruben Kundert)

Q. Have you ever made a search of the records of the Edison Trucking Company to see whether or not there are any records that disclose that you trucked potatoes from Edison or Bakersfield to Los Angeles in March, 1942? A. Yes.

Mr. Lerner: I object to the question as being compound. There are two questions.

The Court: Probably on cross examination, counsel, you can straighten it out, if there is any confusion.

Miss Marten: I will withdraw the question.

Q. By Miss Marten: Have you ever made a search of the records of the Edison Trucking Company for the hauls made by Edison in March, 1942? A. I have.

Q. Do you find any records of hauling any potatoes from Kern County to Los Angeles during that period?

A. No.

Mr. Lerner: I am going to object—

The Court: Don't answer until counsel has had a chance to object.

Mr. Lerner: I am going to object to the question upon the ground that it is immaterial, and does not relate to the issues, and is not in accordance with the pleadings. Furthermore, there is no showing as to whether or not the [9] testimony of this man is directed against the defendants Marvin Berry, Jim Jung and Marty Sherman as individuals, or whether in their capacity, doing business as the Victory Produce Company, or whether the purpose of this evidence is to establish a case against the Victory Produce Company. I feel a proper foundation should be laid. I am objecting on behalf of the defendant whom I represent, your Honor.

Miss Marten: I think as to the parties represented here the record speaks for itself, your Honor. As to

(Testimony of Ruben Kundert)

the materiality of this evidence, it goes to the question of determining Mr. Kundert's, the witness on the stand, trucking ceiling under the regulations of the G. M. P. R.,—General Maximum Price Regulation. That regulation provides that if a trucker hauled potatoes in March, 1943, the highest price which he charges at that time is the ceiling of his competitor.

Mr. Lerner: Even though it would establish that, still it is immaterial insofar as the issues are concerned; further, there is no showing as to whether or not this evidence is establishing the prices for Marvin Berry, Jim Jung as individuals—

The Court: Is there any difference between the ceiling price to individuals, and to a company or association or corporation, counsel?

Mr. Lerner: No, there is no difference, insofar as what the trucker is permitted to charge. The question is [10] whether that evidence is material evidence insofar as those defendants are concerned.

The Court: We can't pass on that until we get along in the case, and find out to whom it does apply. At the present time it doesn't apply to anybody. You can reserve your motion to strike any part of the testimony you think proper.

Mr. Lerner: I would like to reserve a motion to strike any part of this testimony after the same is introduced.

The Court: Yes, at the end of the government's case you are always privileged to do that, counsel.

Miss Marten: Will the reporter please read the last question?

(Question and answer read by the reporter.)

The Court: You spent a lot of time on something that did not mean anything, counsel.

(Testimony of Ruben Kundert)

Q. By Miss Marten: Referring now to the potatoes which you can decide you hauled for Marvin Berry, from Edison to the Victory Produce Company in Los Angeles, California, in April and May of 1943, where did you pick up those potatoes?

A. At Marvin Berry's warehouse.

Q. Where is that? A. In Edison.

Mr. Lerner: For the purpose of saving time, on behalf of the defendants I am representing I will stipulate that [11] this man hauled for Marvin Berry; that he delivered potatoes from the territory in Bakersfield, the company shipping point, to our receiving docks.

The Court: Where are your receiving docks?

Mr. Lerner: 1124 South San Julian Street, Los Angeles; that's the place of business where the defendants were doing business as the Victory Produce Company.

Miss Marten: Would counsel stipulate that the price which Mr. Kundert received for that trucking haul was 30 cents per hundred weight for all the potatoes which he hauled?

Mr. Lerner: We so stipulate, for the period in question.

Miss Marten: That is all.

Mr. Lerner: No cross examination, your Honor. I will make my reservation of a motion to strike. May I ask the Court this: In my motion to strike do I, as a matter of right, have the right to make a motion to strike at the end of the trial, or do I, for the purpose of the record, have to make it for each witness?

The Court: You may reserve it until the entire evidence is in, and make it then.

Mr. Lerner: If your Honor please, would it be improper for me to have the record show that it be clearly

(Testimony of Ruben Kundert)

understood I am not representing Martin Berry, either individually, or doing business as the Victory Produce Company, so [12] any objections or discussions I make, are not made on behalf of those defendants whom I do not represent.

Mr. Handy: We are suing these parties individually and doing business under a certain name. He is appearing for those two defendants individually, doing business under that name. If we show a partnership, we think he is appearing then for the partnership, as representing two of the defendants. We do stipulate he is not representing Mr. Berry personally.

Mr. Lerner: If your Honor please, I am ready to show that the way the action is brought, against Jim Jung, Marty Sherman and Marvin Berry, individually and doing business as Victory Produce Company, does not constitute an action against the partnership as such. I am ready to argue that as a matter of law. If the Court prefers, may I submit the matter by brief, and reserve the ruling, and have that evidence go in subject to that?

The Court: The Court would have no way of knowing the facts, and applying them to the principles of law until I know what the legal relations are between the parties.

Mr. Lerner: May I state, under Rule 17 (b) Federal Rules of Civil Procedure, it is stated:

“Capacity to Sue or be Sued. The Capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to [13] sue or be sued shall be determined by the law under

(Testimony of Ruben Kundert)

which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the District Court is held; except that a partnership or other incorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States."

Under Rule 17 it has uniformly been held, your Honor, that, therefore, the law of the state in which the District Court is held, if there is such law in that state, governs as to how the action shall be brought. It must then come under the law of California, and Section 388 of the Code of Civil Procedure sets out what a person must do in order to sue a partnership. Section 388 reads as follows:

"When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability." [14]

In other words, your Honor, under Section 388 of the Code of Civil Procedure of the State of California, in order to name a defendant company, or associate, or partnership, it is necessary that the partnership be named, as such. I have a number of cases, if your Honor please, holding to the effect that in order to bring an action against a partnership the mere naming of the individual

(Testimony of Ruben Kundert)

doing business as a partner does not constitute an action against the partnership, but, instead, is an action against the individual, and that those words are merely descriptive. May I cite the case of *Bollman v. Bachman*, 16 California Appellate, 589. Do you wish me to go into lengthy detail as to the holdings, in these cases?

The Court: It is not proper, counsel. I tried to suggest that at the beginning.

Mr. Lerner: The only thing is this, your Honor, I don't want to have any misunderstanding on whose behalf I am appearing.

The Court: You have stated it, and it is in the record. I am always anxious to have counsel protect his record. You have done it.

Mr. Lerner: That is all I am interested in at this time. [15]

JACK SCHNITZER,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

A. Jack Schnitzer.

Direct Examination

By Miss Marten:

Q. Mr. Schnitzer, what is your present address?

A. 1345 East Seventh, Los Angeles.

Q. What is your occupation? A. Trucking.

Q. How long have you been engaged in that occupation? A. Over ten years.

Q. Under what name do you do business?

A. Schnitzer's Truck Company.

(Testimony of Jack Schnitzer)

Q. Have you ever made truck hauls from Kern County, Bakersfield and Edison, California, to Los Angeles? A. Yes.

Q. Have you ever hauled any potatoes from Kern County to Los Angeles? A. I have.

Q. By truck? A. By truck.

Q. In March, 1942, did you haul any potatoes from Edison or Bakersfield, or that area around there, to Los [16] Angeles, California? A. I did.

Q. Do you have any record of the haul of potatoes at that time? A. I have.

Q. Do you have those with you this morning?

A. Yes.

Mr. Lerner: If your Honor please, we will stipulate that the haul in March, 1942, if that is correct, was 18 cents a hundred weight for potatoes, covering that territory.

The Court: Is that correct?

Miss Marten: Yes.

Mr. Lerner: May I ask the witness some questions on cross examination?

The Court: Yes.

Cross Examination

By Mr. Lerner:

Q. Mr. Schnitzer, did you haul potatoes in April or May, 1943? A. No, I don't believe I did.

Q. Did you haul any potatoes for the United States Government during that time?

A. It was probably around the latter part of May or June when I started hauling for them.

The Court: When you say "them", who do you mean?

The Witness: The government. [17]

(Testimony of Jack Schnitzer)

Q. By Mr. Lerner: Mr. Schnitzer, you are familiar with the prevailing rate for trucking in April and May, 1943, from that district, are you?

A. I think I am.

Q. What was the prevailing rate of hauling in April and May, 1943, from the district up and around Bakersfield, for hauling from Bakersfield to Los Angeles?

A. I know in April or May it was 30 cents. I didn't haul any.

Q. You didn't haul any yourself? A. But it was established when they had the meeting up there in Bakersfield. They told them they were getting 30 cents. That was understood at that time.

Q. That was the prevailing rate at that time?

A. That was the early part of the season.

Mr. Lerner: No further questions.

Redirect Examination

By Miss Marten:

Q. Mr. Schnitzer, at this meeting, which you say was held in Bakersfield at about that time, when you say they said that they were hauling for 30 cents, who do you mean said that they were hauling for 30 cents?

A. The truckers in general.

Q. Said that they were charging 30 cents?

A. That's right.

Q. Do you know what the ceiling price for trucking [18] from Bakersfield to Los Angeles was at that time?

A. I wouldn't know what the ceiling was, no.

Q. Was anything said at that meeting as to what the ceiling price was?

(Testimony of Jack Schnitzer)

Mr. Lerner: I am going to object to that upon the ground that it is immaterial as to what discussion took place as to what constituted the ceiling.

Miss Marten: I am merely asking him to clarify some statements this witness made, as to whether that was the prevailing rate. I don't believe it is clear what he is talking about.

The Court: Proceed.

The Witness: What is it?

Q. By Miss Marten: Was anything said at that meeting about what the ceiling price for trucking from Bakersfield to Los Angeles was? A. It was two or three days later that they told them they would have to go back to the 18-cent rate.

Q. Did they say why they would have to go back to the 18-cent rate?

A. That is what they decided the ceiling was.

Q. Did you make any statements at that meeting?

A. Nothing more than what we are talking about now.

Q. Did the truckers assembled there say that you had hauled potatoes in March, 1942, and that you had charged 18 cents for the haul? [19]

A. That was no secret; everybody hauled potatoes that year. It just happed to be I hauled about twenty sacks the last day of March.

Q. To your knowledge everybody in April and May, 1942, was charging 18 cents a hundred weight for potatoes? A. To my knowledge—1942?

Q. That is correct; I am referring to 1942; to your knowledge, as a trucker in business there, prior to the time the O. P. A. regulation came into effect, was there

(Testimony of Jack Schnitzer)

a fixed rate for hauling potatoes from Bakersfield to Los Angeles, California?

A. Do you mean from year to year?

Q. Yes.

A. It was more or less agreed upon, yes.

Q. Agreed upon by whom? A. By the truckers.

Q. In that area? A. Yes.

Q. In the year 1942 did the truckers all have such an agreement? A. Yes.

Q. What was that? A. 18 cents.

Q. In 1943 did they make an agreement? A. No, not that I know of. I was not up there.

Q. When you say that in 1943 the prevailing rate for [20] trucking was 30 cents, do you mean that was the rate which the truckers were charging?

A. All I know—after all, I didn't collect it; I didn't pay it; I wasn't there when anybody paid it. I don't know that they paid it. All I know is what went on in the meeting. That was what the truckers were trying to get, or talked to the O. P. A. about, was to get 30 cents a sack. That is as far as my knowledge goes on it.

Q. You are still engaged in the business of trucking?

A. Yes.

Q. You have been continuously for the last ten years?

A. Yes ma'am.

The Court: Where is your place of business?

The Witness: 1345 East Seventh.

Q. Los Angeles? A. Yes.

Q. By Miss Marten: Do you have a place of business in Edison, California, at this time? A. No.

Q. Did you in 1943? A. Not in Edison, no.

(Testimony of Jack Schnitzer)

Q. Did you have a temporary office at the El Cajon Hotel in Bakersfield?

A. That was a little later than the time we are talking about.

Miss Marten: That is all. [21]

Q. By the Court: This rate of 18 cents per hundred weight, what territory did that cover around Bakersfield?

A. Do you mean in 1942?

Q. Yes.

A. That was Edison, Shafter, Wasco. That's about all.

Q. So when the rates were fixed for the transportation of potatoes by the truckers it referred to the area you have just mentioned, and whatever rate was fixed was the rate that applied to that area, is that right?

A. That's right.

The Court: Cross examine.

Recross Examination

By Mr. Lerner:

Q. As I understand it, Mr. Schnitzer, during April and May, 1943, the truckers as a whole were all charging 30 cents a hundred weight for hauling potatoes from this general area down to Los Angeles, is that right?

Mr. Handy: That is objected to upon the ground that the witness testified he did not know.

The Court: Let him answer, if he can.

A. Just as I stated, I didn't collect it; I didn't pay it out; I didn't see it transacted, except what went on at the time, and at that meeting that was the talk, 30 cents.

Q. Is that the meeting in which they stated they were charging and collecting 30 cents for freight from [22]

(Testimony of Jack Schnitzer)

Bakersfield and the Edison district down to Los Angeles? A. Yes.

The Court: Just a minute. That is what they were charging? You also said something about that was what they wanted to get from the O. P. A. Will you clear that up for us?

A. Are you talking about April and May, 1943?

Q. That's right.

A. This meeting was held some time the latter part of May, wasn't it?

Miss Marten: In the early part of it, I think.

A. It seems like the latter part of May. Up to that time nothing was done, and the truckers tried to get a 30-cent rate, and were denied that. Two or three weeks later, when there was another meeting held, they told them they could not charge over 18 cents. The way I took it, everything done up until then was dropped, and from then on it was going to be 18 cents.

Q. By the Court: Prior to the time the O. P. A. fixed 18 cents, is it correct to say that the truckers were charging and receiving 30 cents per hundred weight, or is that what they wanted?

A. Well, it could go either way. I know that's what they wanted, but whether they were charging it or not, I don't know for sure.

The Court: Any further examination?

Miss Marten: Not by the plaintiff. [23]

Recross Examination

By Mr. Lerner:

Q. To clarify one point: It is true, you testified, that at that meeting with the office of Price Administration, the truckers present at that time stated that they had been

(Testimony of Jack Schnitzer)

charging 30 cents, and the purpose of the whole thing was to cut it down to 18-cent ceiling?

A. The meeting was to see what they were going to establish the ceiling at.

The Court: You haven't answered counsel's question.

A. In other words, the O. P. A. was checking up on all the things at that time, so they called a meeting of the truckers, and they asked the truckers what they should have. The truckers were supposed to show cause why they would have to get more money, and so forth. So at that meeting, or the next meeting, it was decided from there on out that the ceiling price would be 18 cents.

The Court: You haven't answered the first part of counsel's question. Mr. Reporter, will you repeat it?

(Question read by the reporter.)

A. Yes, they did.

Q. They told the O. P. A. that they had been charging 30 cents?

A. To my knowledge, that's the way it was.

The Court: That answers counsel's question.

Mr. Handy: May the latter part of the answer be [24] stricken, your Honor; that which was not included in the answer as called for by your Honor's statement.

The Court: Mr. Reporter, will you read the answer?

(Answer read by the reporter.)

The Court: It may stand. Proceed.

Mr. Lerner: I notice the previous witness, representing the Edison Trucking Company, is still here. By reason of the testimony of this witness may I ask that he remain? I would like to have him here for rebuttal.

Miss Marten: Your Honor, we will be glad to have him called in rebuttal now, so that he can be free to go back to Bakersfield.

Mr. Lerner: That is perfectly satisfactory.

RUBEN KUNDERT,

recalled as a witness by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified out of order, in rebuttal, as follows:

Direct Examination

By Mr. Lerner:

Q. Mr. Kundert, during the period of March and April of 1943 do you know what the general rate for hauling potatoes was per hundred weight from the district of Edison and Bakersfield to Los Angeles?

A. 1943? That's when the dispute came up?

Q. That is when you were hauling potatoes for Marvin Berry. [25]

A. The O. P. A. came in and said the rate—

Mr. Lerner: I move that the last portion be stricken as not responsive.

The Court: He hasn't said anything yet. Read the question.

(Question read by the reporter.)

A. First we charged 30 cents, and when the O. P. A. came in and said there was supposed to be a ceiling of 18 we went back and charged 18 cents, just like they told us.

Q. By the Court: What period was that 30-cents charged?

A. It was right away. When we started, it must have been in April. Yes, in April.

Q. Did the truckers up there fix prices each spring, about April, is that correct? A. Yes.

Q. They had a meeting in April of each year?

A. Yes.

Q. In April, 1943, the truckers met and fixed a price of 30 cents or charge of that, did they? A. Yes.

(Testimony of Ruben Kundert)

Q. Until when?

A. It was around the first part of May, when the O. P. A. had the meeting.

Q. Did you hear the former witness' testimony with reference to the area to which the rate applied? Would your [26] answer be the same?

A. What area do you mean? Well, Edison and Shafter and Wasco, that gets them all.

Q. Some other town was mentioned.

A. Arvin.

Q. Yes. So those rates we are discussing here would apply to all that area, is that right? A. Yes.

The Court: Hereafter we will refer to it as the Bakersfield area, if that is satisfactory to the government and the defense. Any further questions?

Mr. Lerner: I don't think of any further questions, but I think counsel can probably stipulate when, approximately, that meeting took place.

The Court: This would be a good time to do that. Do you know when it was?

Mr. Smith: Just from information given to me by members of the Office of Price Administration I believe it took place May 4th or 6th, 1943.

The Court: Is that your understanding?

Mr. Lerner: No, my understanding is that the drop in rates took place about the 25th of May. At that time the truckers all reduced their rate.

The Court: Then you cannot stipulate.

Miss Marten: We talked of two times; we talked at one time as to what the ceiling price was, and at another time [27] as to what the truckers were charging. All this

(Testimony of Ruben Kundert)

conversation relates to the fact that they were charging 30 cents, and at a later time dropped it, but it has no relation to what the ceiling was.

The Court: We understand that.

Mr. Lerner: Yes, we so understand.

The Court: Any further questions of this witness?

Mr. Lerner: No.

DAVE SMITH,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

A. Dave Smith.

Direct Examination

By Miss Marten:

Q. Were you employed by the Office of Price Administration during the year 1943? A. Yes, I was.

Q. During the period of April, May, June and July, 1943, what was your capacity?

A. I was an investigator employed by the Los Angeles District office.

Q. What were your duties in that capacity?

A. I was assigned to the fresh fruit and vegetable unit, and my duties included making surveys pertaining to [28] matters of price control on fresh fruits and vegetables.

Q. Are you still employed by the Office of Price Administration? A. Yes, I am.

Q. What is your present capacity?

A. Enforcement attorney.

(Testimony of Dave Smith)

Q. Directing your attention now to around June and July of 1943, did you have occasion to make an investigation of the records of the Victory Produce Company, 1124 South San Julian Street, Los Angeles, California?

A. Yes, I did.

Q. Were you assisted by anyone in that investigation?

A. Yes, I was, by Mr. Jack Keenan of the San Francisco office, Accounting Division.

Q. With what part of the O. P. A. was he associated?

A. Accounting Division, San Francisco office.

Q. What occasioned your investigation of the *Victor* Produce Company at that time?

Mr. Lerner: I object to the question upon the ground that it is immaterial.

The Court: Overruled.

A. I was assigned, in the course of my duties as investigator, to make a survey to check the extent of compliance with the potato regulation in connection with the sale and purchase of potatoes by the Victory Produce Company. The attorneys making the assignment to me were Mr. Eugene [29] Breitenbach and Miss Arline Marten.

Q. Do you recall the exact date when you first visited the Victory Produce Company for the purpose of making this investigation?

A. No, I am sorry; I don't recall the exact date.

Q. Was it June or July? A. It was in July.

Q. Did Mr. Keenan accompany you when you first went there to make the investigation?

A. Yes, he did.

Q. To whom did you speak when you arrived at the Victory Produce Company? A. The person I am cer-

(Testimony of Dave Smith)

tain I spoke to was Miss Brooks, identified as office manager.

Q. Was anyone else present at that time?

A. Mr. Keenan.

Q. What was said?

A. I had met Miss Brooks before. I had also met Mr. Sherman and Mr. Jung.

Q. Were they present at the conversation I am asking you to relate?

A. I don't believe they were when we went upstairs to speak to Miss Brooks. They told us to see her about any matters pertaining to office records. Mr. Keenan and myself went up there and spoke to her.

Q. Who told you to see Miss Brooks, do you recall? [30]

A. I believe it was Mr. Sherman.

Q. At the time you saw Miss Brooks, and Mr. Keenan was present, what was said?

A. Mr. Keenan was introduced by me to Miss Brooks, as being associated with me in a matter pertaining to a prospective survey of their records of potato sales. I told her we were interested in making an audit of their purchases and sales of potatoes.

Q. Do you know what Miss Brooks' capacity was with the Victory Produce Company?

A. She identified herself to me as office manager; not on that occasion, but she formerly had done so.

Q. What else was said after you told her you were checking records?

A. She asked me which records we were interested in looking at, and I told her they would include the lot sheets, lot records, sales invoices, purchase invoices, and possibly

(Testimony of Dave Smith)

other records which we might require, the necessity of which would be better known to us during the course of our survey.

Q. Did you inspect those various records?

A. Yes, we did; the two of us did.

Q. Did you inspect those lot records that you speak of? A. Yes.

Miss Marten: Counsel, do you have in court here this [31] morning the lot cards?

Mr. Lerner: Yes. I have these two volumes here.

Q. By Miss Marten: I want to show you this book of lot records, and ask you if you recognize this as the record that you inspected during the course of your investigation?

Mr. Lerner: Just state if that this book contains the April records, and the other one contains the May records. Is this the form in which the records were given to you at that time?

A. I have been looking through this to see if I can find some potato sales, that is, potato records. I haven't come across any that look familiar to me.

Q. By Miss Marten: Were the records in a bound book when you examined them?

A. Yes; they were in a book similar to this. I don't know whether this book includes potato records.

Mr. Lerner: I will say for the purpose of the record that the bound ledger which is being looked at by the witness includes all of the records of sales of potatoes by the Victory Produce Company during the period in question, and automatically includes potatoes purchased and sold.

A. Here is one I see here, Mr. Lerner.

(Testimony of Dave Smith)

Q. By Miss Marten: Do you recall what information the lot record contained in regard to potatoes?

Mr. Lerner: If your Honor please, the record speaks [32] for itself.

A. It is all before me.

Q. By *Mr.* Marten: What information do the records contain?

A. It has the name thereon: M. Sherman & Sons, Inc. and shows lot number, contents of lot, expenses, including freight, and it has a sales record indicating the quantity, the unit price, and individual or individuals or persons to whom sold. It has other information on there such as, for example, profit, but that was no part of our survey. We weren't interested in that. We made no note pertaining to that.

Q. Does it contain the date when the particular lot referred to was purchased?

A. It has the date of arrival, which my understanding was, it was a matter of hours for the haul from Bakersfield to Los Angeles.

Q. Does it contain the date when the potatoes were sold out of that lot?

A. Yes, it has the date sold.

Q. Does it contain the price at which the potatoes were sold?

A. Yes.

Q. Does it indicate the grade of potatoes that were being sold?

A. The description, content, it has the designation [33] of the grade.

Q. Is there a price per hundred weight, or what unit is the price, the sales price?

A. At the time we made out audit we were told that that all speaks of unit.

(Testimony of Dave Smith)

Mr. Lerner: We object to what they were told upon the ground it is hearsay. The record speaks for itself, for what it is supposed to be. If he doesn't have the record, we have the invoices of original sales. What somebody told him is immaterial, and definitely hearsay.

The Court: Do you mean a statement by the defendant to this witness is hearsay?

Mr. Lerner: He doesn't say who told him.

The Court: Yes, Miss Brooks was in charge. He was told by Mr. Sherman to get his information from Miss Brooks; she was the general manager.

Mr. Lerner: Do I understand he was told by Miss Brooks this information he is now giving the Court, or he was told by somebody else as to what that constituted?

The Court: That is a good question. Answer counsel's question.

A. Mr. Lerner, the discussion of the records was had with Miss Brooks—the discussion pertaining to the records.

The Court: That is what I understand.

Mr. Lerner: Those statements made were statements made [34] by Miss Brooks, an employee of the Victory Produce Company?

The Court: That is what I understood.

Mr. Lerner: I have no objection then.

A. For example, we would understand it as such also, because it was my duty—I was familiar with that particular type of record. It says: "U. S. No. 1, 100 pounds." The potatoes were packed in two types of sacks. The pack customarily is 100 pounds, unless there is a smaller breakdown.

(Testimony of Dave Smith)

Q. Are they sometimes packed in 50-pound sacks?

A. Yes. This U. S. designation, No. 1, indicates No. 1 grade, packed in 100-pound sacks.

Q. Is the unit price stated in units of 100 pounds?

A. They were sold by sack, which would be sales of 100-pound sacks.

Q. In addition to these lot records you inspected purchase invoices, you say?

A. Yes, Miss Marten.

Q. For the purpose of the record, these pink invoices which I now show you, are they purchase records of the Victory Produce Company for potatoes, during April and May, 1942?

Mr. Lerner: I am going to object to all of the testimony that has been introduced by Mr. Smith so far, the objection being raised on behalf of Marty Sherman, Jim Jung, individually, and doing business as Victory Produce [35] Company.

The Court: Let the record so show. Objection overruled. Exception allowed defendants.

Q. By Miss Marten: I show you these pink purchase invoices, Mr. Smith, and ask you if you recognize those as purchase invoices which you inspected at the time of your investigation.

A. They look like the invoices we checked over. I believe that we also checked some green ones.

Mr. Lerner: If your Honor please, I am going to move that the answer be stricken as not responsive. The question was whether or not these were the ones he had checked, not "we". The answer was "we".

The Court: All right. Did you check these?

A. Yes, I did, your Honor.

(Testimony of Dave Smith)

Q. By Miss Marten: Will you see if you can identify any of these as the record which you were called to inspect at that time, the purchase record covering potatoes?

A. As I say, I think we also saw some green ones. On these green ones was stamped a lot number, if I recall correctly. I think we saw these also, and some green ones which were possibly duplicates of these. I think we used these. There was a cross reference; for example, a lot number, a purchase ticket from Marvin Berry, and we would cross check the lot book to reconcile the figures and facts on both of these records. [36]

Q. Did you find that these purchase invoices cross checked with the lot cards contained the same information as was put on the lot cards?

Mr. Lerner: If your Honor please, I object to that upon the ground that it calls for the conclusion of the witness, and without proper foundation.

Miss Marten: I will withdraw the question, your Honor.

Q. By Miss Marten: You say you cross checked the lot cards and purchase invoices. What did you cross check?

A. Well, for example, I have before me Lot No. 375. We looked for the purchase ticket, which had the stamp on there, which Miss Brooks informed us also indicated a lot. We looked for the ticket bearing lot No. 375, which we checked to see whether or not the facts stated on the purchase invoice were the same as transposed on the lot sheet.

Q. What did you find the fact to be?

A. In a great majority of cases they were the same. However, there were a few discrepancies.

(Testimony of Dave Smith)

Q. Did you ever have occasion to look at the sales invoices of the Victory Produce Company during your investigation? A. Yes, we did.

Miss Marten: For the purpose of the record, can we stipulate that these six bound volumes here constitute the sales invoices of the Victory Produce Company, covering the sales of potatoes during April and May, 1943? [37]

Mr. Lerner: I will stipulate that they include all of the charge sales for the period in question, and automatically includes the sales of the Victory Produce Company. There were certain cash sales made, but we were unable to locate the record of cash sales. However, I will state this, that the cash sales are comparatively minor and insignificant with respect to the amount of charge business done. However, the stipulation I am entering into is not on behalf of the Victory Produce Company; I am entering into this stipulation on behalf of the individuals. We recognize these records are records of the Victory Produce Company.

Q. By Miss Marten: I show you one of these six volumes, which is identified as sales record, and ask you if you recall making an investigation as to any of these sales records with regard to potatoes.

A. Yes, these are records, these yellow tickets, recalling to my memory that part of the audit we made were these sales tickets.

Q. What investigation did you make of the sales tickets?

A. Specifically I checked, spot checked such sales tickets to ascertain whether or not the information placed on the lot sheets was the same as would have been on the

(Testimony of Dave Smith)

sales invoices. We did not go through every sales invoice; just made a spot check.

Q. What did you find on that spot check regarding [38] the indication on the lot card of the sales that were made, compared to the sales invoices?

Mr. Lerner: I object to the question on the ground that the proper foundation has not been laid. He stated "we checked"; now she wants to get an answer as to what he found.

Q. By Miss Marten: Did you yourself make the check?

A. I checked, but Mr. Jack Keenan also checked with me. That's why I used "we".

Q. How did Mr. Keenan check with you?

Mr. Lerner: I object to the question on the ground that it is hearsay.

The Court: No, that would be a statement of what he did; just how they handled the physical transaction. Proceed.

Q. By Miss Marten: Just what did you and Mr. Keenan do?

A. Again illustrating, assuming we had lot 375 before us, and we had a record of sales, possibly we would find lot 375, that particular lot indicated on the sales invoices. Also we tried to find the same sales tickets with the lot number on, and checked from them whether the price on the sales invoices was the same as transposed on the lot sheets.

Q. What part did you check, and what did Mr. Keenan do? [39]

A. We both worked together. We had lot sheet 375 before us, we will say, and we checked to see if we could find any purchases on the sales records. He would pick

(Testimony of Dave Smith)

up the book, or I might pick up the book, and we might check; or I might look at it and compare it, and see what it showed.

Q. Were there any other records you had occasion to inspect during the course of this investigation?

A. I think, as I say, I saw some green invoices. Possibly my recollection is wrong, because I did not see any this morning.

Q. Did you have occasion to look at the records of the company invoices for the haul of potatoes?

A. Well, I know we looked at some invoices which were there, and had the designation "Edison Trucking Company" on them.

Miss Marten: Can you stipulate for the record, Mr. Lerner, that this folder, yellow or orange invoices, contain—what does it contain?

Mr. Lerner: On behalf of my defendants I will stipulate that this folder contains freight charges by Edison Trucking Company to Victory Produce Company, but those were invoices chargeable to Marvin Berry.

Miss Marten: Do you stipulate that for the record?

Mr. Lerner: Yes; that's for the purpose of the record. The testimony was that the hauling was done for the Victory Produce Company. [40]

Miss Marten: Are you stipulating that these are the trucking invoices which were paid by Marvin Berry, or by Victory Produce Company?

Mr. Lerner: I think maybe we ought to enter into the stipulation this way; I offer this stipulation: I think it is generally recognized that the sales were made on a delivered basis; that the freight was being purportedly paid for by Mr. Berry, but as a matter of bookkeeping convenience, at the request of Mr. Berry we would pay

(Testimony of Dave Smith)

the freight directly to the Edison Trucking Company, and deduct the same from the price billed to us by Marvin Berry or other potato companies from whom we purchased. I say "we"; I mean from whom the Victory Produce Company purchased.

Miss Marten: We don't stipulate to that, your Honor.

The Court: Didn't you make a summary or statement from all of these records with reference to the issues in this case, as to the purchase of potatoes and the grade and price and trucking charge, as shown by these bills? Didn't you make a summary of that from the books?

A. Yes, we did, your Honor.

The Court: Have you seen it?

Mr. Lerner: Yes, I have seen the summary, your Honor, but the question arises in my mind whether or not it is proper to introduce a summary of this nature. The cases clearly hold, in order to permit the introduction of a summarization from the books, that proper foundation must be [41] laid to show that the summary was properly arrived at; also, opposing counsel must have an opportunity to cross examine in order to establish its accuracy.

The Court: I was not thinking of a whole lot of legal technical objections at all. These are very simple matters, and the thing we are trying to get away from in this court is a lot of technical, time-wasting procedure. Here are records. This witness could spend two weeks in saying that on line 1 he finds a truck of potatoes of 500 sacks, at a price of so and so. That is absolute nonsense.

Mr. Lerner: I agree with your Honor.

The Court: We are all familiar with the rule in regard to a summarization, that the witness must qualify to show how they were made. There is no reason why

(Testimony of Dave Smith)

counsel can't sit down and go over this, and satisfy themselves that they are records, the prices, the dates, the amount paid, and introduce them as an exhibit. If counsel desires to take up the time of the court, and take up every item to establish them, I will proceed on that theory.

Mr. Lerner: If your Honor please, counsel has no purpose in mind of doing anything of that nature. The testimony so far has been merely to show the procedure which he followed in order to arrive at a summary. It is my stipulation that his findings were probably correct, providing the procedure he used was also correct. The only objection I have to the summarization that has been made by counsel for [42] the plaintiff is, in addition to showing what the costs and sales were, they attempt to show the purported price ceiling or purported violation, by sales in excess of the ceiling. Those are only conclusions of law.

The Court: You are absolutely right, counsel. In other words, you are not stipulating to the fact that they are not proper ceiling prices. I would not ask you to do that. All I ask you is not to take up the time of this court or the other lawyers in cases that should be tried. When it comes to a matter of bookkeeping, one thing that annoys the Court is to have to sit around the whole day, and have counsel get up at the end of the day and say, "We stipulate to all of that."

Mr. Lerner: I have no intention whatsoever of putting the Court under that burden. The only thing that I am interested in, and for the purpose of the record, for my own information, is to see if there is any basis for cross examination, and the basis for cross examination is the procedure which he followed in arriving at the figures

(Testimony of Dave Smith)

shown by plaintiff in the exhibits that were used in the pre-trial matter.

The Court: Counsel, will you hand that exhibit to counsel, and let him take the witness on voir dire, and see if he is satisfied with the method by which that was compiled?

Mr. Lerner: I believe I have a copy of it. [43]

Voir Dire Examination

By Mr. Lerner:

Q. Mr. Smith, I show you Plaintiff's Exhibit No. 2 for identification. You have seen this before, have you?

A. Yes, sir.

Mr. Lerner: For the purpose of the record, this is headed, "Victory Produce Company, Los Angeles, Cal. Overcharges based on 21 per cent mark-up, April, 1943," and starts with page 1 and continues consecutively to page 17, and still in the same exhibit, commences again on what is shown on here as Schedule 2, page 1, Victory Produce Company, Los Angeles, Cal., overcharges based on 9-1/2 per cent mark-up, April, 1943; and continues as such, under Schedule 2, separately numbered pages from 1 to 6; and then continues with the further designation, within the same exhibit for identification, as Schedule 3, page 1, and is headed, Victory Produce Company, Los Angeles, Cal., overcharges based on 21 per cent mark-up, May, 1943, and continues, numbered consecutively, to page 5; and then we have as the last page of this exhibit, Schedule 4, headed, Victory Produce Company, Los Angeles, Cal., overcharges based on 9-1/2 per cent mark-up, May, 1943. There is only one page of that. You are familiar with this entire exhibit?

A. Yes, I have seen it, Mr. Lerner.

(Testimony of Dave Smith)

Q. Was that prepared from the record that you had [44] compiled? A. Yes.

Q. Would you say that you had compiled that, or they were compiled by you and Mr. Keenan?

A. Compiled by Mr. Keenan and myself; not by me alone.

Q. Do you know what proportion of this work was done by you, and what proportion was done by Mr. Keenan?

A. Do you mean what proportion of the entire audit?

Q. Of the compilation.

A. No. What compilation do you mean?

Q. In order to establish these schedules which you prepared on behalf and for the United States Government, Office of Price Administration, you made an audit of the Victory Produce Company, is that correct?

A. Right.

Q. Along with you was a Mr. Keenan, also employed by the Office of Price Administration? A. Right.

Q. You worked together? A. Right.

Q. Throughout the entire audit? A. No.

Q. Did not Mr. Keenan work with you?

A. We were there for several days; then I was assigned to another matter for some time; then I came back, and we finished it. So there were possibly a couple of days taking [45] facts and figures alone, but when I came back I checked them.

Q. In the course of your checking, you attempted to check from the original invoice to this record, which is a secondary record; that was your first posting from the original record?

A. I believe that is the system Victory used.

(Testimony of Dave Smith)

Q. Is that how you audited it?

A. We cross checked from the sales invoices to this, but this is the primary record we resorted to.

Q. Referring to the lot record; in other words, you went first to the lot record, and from the lot record you went back to the invoice record? A. Yes.

Q. You went back from the invoice record to the purchase record, and from the lot record to the purchase record?

A. Yes, we looked also at the sales summary sheet or record. I recall at the time we wanted to verify another fact, that is, the total sales indicated in here, as to whether or not they were reflected as the total sales elsewhere. We asked Miss Brooks at that time if there were any records in which this same account possibly could have been posted, or account for this particular line. She gave us what she called a sales summary.

Q. The sales summary was the purported summarization of the total sales for each respective lot of potatoes taken [46] from the total arrived at from the lot record, is that correct? A. That is my recollection.

Q. So far as you know was there any method by which you checked the total sales in the lot record with the sales shown on the general ledger, the actual sales of the company?

A. I don't believe we checked the general ledger, Mr. Lerner.

Q. In other words, you would not know whether or not the total sales as reflected in the sales summarization as the actual sales, are shown on the general record?

A. There might have been a record which we did not see, which might have had the figure; I don't know. But

(Testimony of Dave Smith)

the records we did check, though, we found they were the same.

Q. In the course of your auditing did you make any marks or designation upon the records which you checked?

A. I don't believe we marked them at all.

Q. You made no markings?

A. When I was an investigator I never made any marks on the records I checked.

Q. Is that in accordance with instructions of your superior?

A. I don't think it was.

Q. You had no instructions as to the procedure to follow in your audit; that was in your discretion?

A. Before I was ever engaged they ascertained whether [47] or not I was competent to do that. They never told me whether I should or should not mark the records.

Q. What has been your experience in making audits?

A. While in college I took accounting. When in school, in order to help pay my tuition I did some accounting outside. When I went to work for the O. P. A. I also did auditing in the course of my duties as investigator.

Q. For the purpose of determining your experience, what year was the first time you commenced doing any accounting work?

A. Let's see when I started college. I would say 1936.

Q. Is that when you started college?

A. No, 1935, but I did not take accounting in my first year.

Q. In 1936 you took a course in accounting?

A. As I recall, I started in 1936.

(Testimony of Dave Smith)

Q. What school was that?

A. I first attended the Los Angeles City College; then I went to the University of California at Los Angeles; then I took law at Loyola.

Q. At what school did you take accounting?

A. I took accounting at the Los Angeles City College; also some accounting at U. C. L. A.

Q. How many years did you study accounting?

A. As I recall, two years. [48]

Q. In other words, you studied in 1936 and 1937; is that correct?

A. That would be approximately true.

Q. What year was it that you first applied whatever knowledge you acquired to accounting?

A. As soon as I learned enough about it I tried to assist my father in his business.

Q. What year was that?

A. I would say about 1936, after I had learned the elements of accounting.

Q. Bookkeeping?

A. No, I took accounting, not bookkeeping.

Q. You had had a course in bookkeeping prior to that time?

A. No.

Q. You started out immediately with accounting?

A. That's right.

Q. What was your first experience in auditing?

A. As I recall, they were records which I was keeping in order to assist in meeting my expenses. The work was done in connection with an audit of the Unemployment Commission of the State. They desired me to make an audit concerning records, concerning certain stocks they desired. I believe that was the first time I made an audit record.

(Testimony of Dave Smith)

Q. What year was that?

A. I can only approximate. [49]

Q. What is your best recollection?

A. That was possibly about 1937. However, I haven't been an auditor. That's not my profession.

Q. You haven't been an auditor?

A. No. The work I have done in auditing has been only incidental. First of all my pursuits was the study of law; secondly, the practice which I have had. That was not my profession, and in the work I did in this it was primarily picking up information. I don't think anybody would have to have any auditing experience to make a copy of this.

Mr. Lerner: I move the last portion be stricken as not responsive, and volunteered.

The Court: I was going to say that myself. In other words, you take a stenographer who never saw a book and say to her, "Copy this page." You don't have to show that she went to college for ten years, and was a stenographer for five years, and a certified public accountant to copy some pages out of a book. Proceed.

Q. By Mr. Lerner: Have you any idea—can you form any basis of what percentage of the actual invoices were verified or checked with the lot sheets?

A. I couldn't. That was done in June and July of last year. I really don't remember. It was a spot check; not a complete check.

Q. You don't know what percentage of invoices you checked to arrive at your spot check? [50]

A. No; I do not.

Q. You don't know whether it was 5 per cent or 10 per cent or 15 per cent? A. No.

(Testimony of Dave Smith)

Q. You don't know what percentage of the check was made by Mr. Keenan?

A. No, sir. I would say the same percentage would apply for our joint work. However, I might add we not only checked the credit tickets you have here today, but also some of the cash tickets.

Mr. Lerner: If your Honor please, for the purpose of expediting the entire procedure, we have no objection to stipulating, insofar as the defendants that I am representing are concerned—if the Court should hold I am representing the Victory Produce Company—that is a legal conclusion; I am of the opinion that I am not representing the Victory Produce Company, but I am representing the defendants I named, as the record will show—

The Court: We will take that up, as I have said, at the conclusion of the case. I will hear the facts, and then we will proceed with the law.

Mr. Lerner: On behalf of the defendants I am representing we will offer to stipulate this, your Honor: That Exhibit No.2 for identification on behalf of the plaintiff, insofar as the same recites the lot number, the grade, the number of 100-pound sacks sold, and the selling price, is [51] probably reasonably accurate.

The Court: Put it this way; that it is accurate, subject to any correction that counsel may find necessary during the trial.

Mr. Lerner: With the further exception, if your Honor please, that we will not stipulate as to anything affecting the 50-pound sacks, on the ground that it is a variance and contrary to the pleadings. The pleadings allege the sale of 100-pound sacks, and says nothing about 50-pound sacks. May I refer the Court's attention to page 2 of the amended complaint, at Paragraph 5. No

(Testimony of Dave Smith)

reference whatever is made in the complaint as to 50-pound sacks. Therefore any evidence offered as to 50-pound sacks is at variance with the pleadings, and it is objectionable upon that ground.

The Court: Is there any difference, counsel, in the ceiling price on 100-pound sacks, in the handling and sale of it, the same kind of potatoes, and 50-pound sacks?

Mr. Lerner: I believe there is. I believe there is an allowance for sacking.

Miss Marten: That is not my understanding. There is on 20-pound sacks, and odd sacking.

The Witness: There is no increase in mark-up. I have the regulation here.

The Court: The government has stated its case on 100-pound sacks. I think Mr. Lerner is correct.

Mr. Lerner: Any evidence as to 50-pound sacks would be [52] immaterial, and outside of the issues.

The Court: I will rule with you on that, Mr. Lerner, because the government attorney stated 100-pound sacks.

Mr. Lerner: I offer to stipulate, as to this summarization prepared by the plaintiff, insofar as that affects the 100-pound sacks, we are willing to stipulate that the record is a reasonably accurate record of the sales of the Victory Produce Company. I make this stipulation on behalf of the clients I am representing. I would like to have the record clearly show that no stipulation is being entered into at this time as to what constitutes the proper mark-up, or what constitutes overcharges, if any, or what constitutes maximum price ceilings, or what constitutes any overcharges, if any.

Miss Marten: We are agreeable to stipulating to that. At this time we will offer in evidence Plaintiff's

(Testimony of Dave Smith)

Exhibit 2 for identification, subject to that stipulation. I might suggest, Mr. Lerner, that the stipulation be that Plaintiff's Exhibit 2 for identification is correct, subject to any variance which counsel may show later, rather than stipulating that it is reasonably correct. Can you make the stipulation that it is correct, subject to any change that is made? To stipulate that it is reasonably correct does not do us much good in determining damages.

The Court: I think, Mr. Lerner, that is the correct stipulation. If there are any errors the Court is willing [53] to see that they are corrected. I am sure nobody wants to go through each one of these entries now.

Mr. Lerner: Will the reporter read that?

(Record read by the reporter.)

Mr. Lerner: Yes, I think that is reasonable, your Honor. I have no objection to stipulating to that. I want it clearly understood that there is no stipulation as to anything other than the first four columns to the left.

Miss Marten: May this be admitted in evidence?

The Court: In evidence, subject to the stipulation.

The Clerk: Exhibit 2 in evidence.

(The document heretofore marked as Plaintiff's Exhibit No. 2 for identification, was received in evidence.)

Miss Marten: Do you want to stipulate as to Plaintiff's 1 for identification, which was heretofore offered?

Mr. Lerner: I refuse to stipulate to that. I think it is absolutely incorrect. I am sorry.

Q. By Miss Marten: Mr. Smith, during the course of your investigation did you make any calculation from the records of the Victory Produce Company as to the ceiling prices which applied to them for the sale of the

(Testimony of Dave Smith)

various grades of early white potatoes, during April and May of 1943?

A. I calculated ceilings for the potatoes, for which the summary was made, all grades and varieties.

Q. As investigator of the O. P. A. were you familiar, [54] at the time of your investigation, with Maximum Price Regulation 271, as amended?

A. As amended, yes, I was. Most of my work related to 271 at that time, because potatoes were quite critical.

Q. Will you tell us how you calculated, just in general, not as to any particular ceiling, but in general, the method you used to calculate the ceiling price of potatoes for the Victory Produce Company; for instance, U. S. Grade No. 1 potatoes?

A. The regulation sets forth the procedure to be followed in figuring or calculating ceiling prices, and I followed the procedure outlined in the regulation.

Q. What was that?

A. Substantially I believe it provides this—however, as I say, we followed it right down, and I may miss some particular phase of it in describing it here now, because it has been quite some time since I worked with it. At the time I was very familiar with it. It provided that the intermediate seller of potatoes shall calculate the ceiling price for each grade or variety of potatoes which he desires to sell a particular week, the week beginning on a Monday, during the preceding seven days the seller is to check from his own records the largest single purchase of each grade and variety of potatoes purchased to determine his net cost.

Mr. Lerner: I object to the question upon the ground [55] that it is not the best evidence. The Act

(Testimony of Dave Smith)

can be introduced to show what it provides, rather than his recollection of what the Act provides.

The Court: That is correct.

The Witness: It is the regulation—

The Court: You have them here. I think the Court takes judicial notice, but counsel is correct; the Act speaks for itself, or the regulation. Have you got one, counsel?

Miss Marten: Yes, I did have one I think in our pre-trial brief, which listed the pertinent section. [56]

Mr. Lerner: On the 27th of May Regulation 271 was revised. I want to make sure we are not getting the revised regulation rather than the original regulation as amended.

Miss Marten: This is M. P. R. 271, up to May 27th.

Mr. Lerner: Yes, that seems to be right. I intended to bring in, to further show to the Court, in case he needed it, the Federal Register showing it. This appears to be correct.

Q. By Miss Marten: I am not asking you now what the regulation is, but first, as to how you calculated the ceiling. Did you make a memorandum of the calculation which you made of the ceiling prices of potatoes sold by Victory Produce during the period April and May, 1943?

A. Yes.

Q. Was that written up in typewritten memorandum form?

A. Yes, it was.

Q. I show you Plaintiff's 1 for identification, and ask you if you have seen that before?

A. Yes, I have.

Q. Is that the typewritten copy of your memorandum of the calculation of the ceilings for each grade of potatoes for each week during April and May, 1943?

(Testimony of Dave Smith)

A. It represents all the calculations I made as to the ceilings on various grades and varieties which their records indicated were sold.

Q. I direct your attention to the part of the [57] memorandum which says, "Size and Grade Differential Sales—April 5 to April 19," and there is indicated No.

1-A. What does that mean?

A. 1-A represents U. S. No. 1, Size A. No. 1 is the grade, and A is a size.

Q. Then these figures "Base 2.70." Will you explain how you arrived at the calculation of a price for the Victory Produce for No. 1-A potatoes for the week beginning April 5, of \$3.73 per hundredweight, as itemized here?

A. The regulation sets forth the country shipping prices. The price of \$2.70, instead of calling it country shipping prices, the price I put on my shipping base was \$2.70. The regulation provided at the time 10 cents 1 hundredweight, Size A, so I added 10 cents; it also provided that where the country shipper makes a sale on a delivered basis he can add 10 cents per hundredweight.

The Court: Plus transportation?

The Witness: Yes. "Frt" stands for "freight," which is another charge the country shipper can make in determining the delivered price of potatoes. Those were four items which were applicable to these particular potatoes, at Los Angeles; that is, the delivered price to L. A. was \$3.08, and we figured it that way. The reason I added was because we allowed 18 cents freight rate, which I was informed was the ceiling price, whereas their calculation [58] included a charge of 30 cents.

(Testimony of Dave Smith)

Q. In your calculations you used the freight rate of 18 cents, and with a mark-up made \$3.73, the ceiling price hundredweight for this size potatoes?

A. Adding \$2.70 and the others, on Grade 1, it gave us a price of \$3.08, delivered at L. A., per hundred pounds. The regulation provides that sales made on a delivered basis, a mark-up of 1.21 shall be taken over the delivered cost.

Q. When you say sales made on a delivered basis, do you mean sales made by the Victory Produce Company?

A. Yes. In describing the price, I am computing the ceilings which they showed us in their sales.

Q. Service and delivery sales?

A. Yes, a 1.21 per cent mark-up figure was applicable to that type of sale. 1.21 times \$3.08 resulted in a ceiling of \$3.73 per hundredweight.

Q. Did you calculate any other type of ceiling for any other type of sale for Grade No. 1 Size A potatoes?

A. There was a 9-1/2 per cent mark-up applicable where the sale was not made on a delivered basis. I used the delivery cost, transportation cost of 3.08, multiplied by 9-1/2 per cent, which resulted in a ceiling price of \$3.37 per hundredweight.

Q. Did you make an investigation of the records of the Victory Produce Company to see what was the net cost of [59] their largest single purchase of U. S. No. 1 Size A potatoes for the week preceding April 5, 1943?

A. As I recall, there weren't any purchases of potatoes made prior to April 5. That is my recollection. There may have been. If there were, what I did—the regulation says to show the largest single purchase of the preceding week.

(Testimony of Dave Smith)

Mr. Lerner: I object to the answer upon the ground that it is not responsive, and further, his recollection is improper.

The Court: The regulation has been introduced.

Q. By Miss Marten: What net cost did you determine as net cost for U. S. No. 1 Size A potatoes on which to apply the mark-up for the sales made after April 5th? How did you arrive at that net cost? Where did you get that figure?

A. It would be from a purchase of potatoes in which these various figures were applicable. It would either have been the largest single purchase of the preceding week, which I doubt, because as I recall, I don't believe there were any purchases prior to April 5th; or it would be the most recent purchase, which is another alternative for calculating the price where there aren't any purchases during the preceding week.

Q. You did one or the other of those two things?

A. That is correct.

Q. I see you calculated a price for No. 2 potatoes, [60] on page 1 of this Plaintiff's 1 for identification. What essential difference is there in the calculations for Size 2 potatoes as distinguished from U. S. No. 1 A potatoes?

A. One factor is I deducted 30 cents per hundredweight for the grade; and the second factor would be the absence of the Size A. We get on U. S. 1 A a premium of 10 cents, whereas there couldn't be on No. 2, which is not Size A; which gave a net difference of 40 cents per hundredweight.

Q. Will you refer now to page 2 of the schedule. Plaintiff's Exhibit 1 for identification, where it says: Sales April 19 to April 26, 1943. Tell us how you ar-

(Testimony of Dave Smith)

rived at the ceiling prices for the different grades of potatoes which are indicated on page 2.

A. Shall I take each one of the grades and *varities*?

Q. Tell us in general.

A. Well, U. S. No. 1 potatoes, the country shipping price there was \$2.70 per hundredweight; 10 cents for selling on a delivered basis; and the freight—the freight we used was different from the freight actually paid, because of the reason brought to the attention of the Court. That resulted in a net cost of \$2.98, taking that particular grade of potatoes. This was computing the ceiling for potatoes sold during the week of April 19 to April 26, 1943. In making that selection I looked back to the largest single purchase in the preceding week, and found the price that was [61] applicable, taking respectively, and multiplying 1.21 per cent and 9-1/2 per cent, which fixed the ceiling of \$3.61 per hundredweight with 1.21 mark-up and \$3.26 with the 9-1/2 per cent mark-up.

Mr. Lerner: I think we might be able to save some time, if it would be stipulated to this extent: I am satisfied mathematically speaking, his computation is correct. I disagree with him as to the figures he used in determining the basis, but from a mathematical standpoint I am satisfied to stipulate that \$2.70 and adding 10 cents and 18 cents, comes to \$2.98, and on the application of 1.21 and 1.095 would bring the result shown on Plaintiff's Exhibit 1 for identification. I am willing to stipulate that the mathematical calculations are correct; that anything with respect to the 50-pound calculations are not within the stipulation, because not within the issues. I am further willing to stipulate that the base price, he used in all cases was the country shipper's

base price, but I am expressly not stipulating to the manner or method of arriving at the maximum price ceiling that he used. I am offering to stipulate that the computations made by Mr. Smith were accurately computed, based upon the theory that he followed. I am not stipulating that the theory that he followed is correct.

Miss Marten: You stipulate that Plaintiff's 1 for identification reflects the theory that Mr. Smith followed? [62]

Mr. Lerner: Yes. In other words, he followed the country shipping theory. I think I can stipulate this: That the theory followed by plaintiff to determine the maximum price ceiling was they took the country shipping point under the regulation which specifies how a country shipper determines his prices; thereafter they added price differentials, based on grade, quality and size, and thereafter they added the freight rate of 18 cents, which they contend was the maximum price ceiling which the country shipper could have, or was permitted to have, and in some cases the freight rate of 22 cents, which is the railroad or common carrier rate.

The Court: Would you further stipulate that the potatoes' weight correctly reflects the books of the company?

Mr. Lerner: I don't quite understand that, your Honor.

The Court: In other words, to start with, what the books reflect in the way of potato sales?

Mr. Lerner: As to the highest individual purchase?

The Court: Yes.

Mr. Lerner: I stipulate that is correct; the record shows that. There is no point in doing otherwise. I will stipulate to that, your Honor. This stipulation is being offered on behalf of the defendants I represent.

The Court: I understand. [63]

Miss Marten: I think at this time we will offer Plaintiff's 1 into evidence.

The Court: Subject to the stipulation?

Miss Marten: That is correct.

Mr. Lerner: And subject to the 50-pounds not being a part of it.

The Court: I ruled on that, the 50-pounds is out, because it is not stated in the complaint, the government resting on the 100-pound sales.

The Clerk: Plaintiff's Exhibit 1.

(The document referred to was marked as Plaintiff's Exhibit 1, and was received in evidence.)

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m.) [64]

Los Angeles, California, Wednesday, November 1, 1944, 2:00 p. m.

Mr. Handy: May it please your Honor, during the morning session there was a stipulation offered concerning some of these matters, and concerning 100-pound and 50-pound sacks of potatoes. Objection was made to the introduction of the evidence under the document that was being stipulated into evidence, that portion thereof which referred to the 50-pound sacks, and that that should not be included in the stipulation. We did not make an objection at that time, because, as a matter of fact, we were a little bit taken by surprise; we did not anticipate it, and were not certain what the situation was. During the noon hour I have looked through the pleadings, and have checked the rules of court. We would like at this time to amend our pleading by adding "One hundred sacks and fifty pound sacks." We base that on Rule

15 of the Federal Rules of Civil Procedure, on the ground that it is not taking counsel by surprise. It makes no difference in the computation of the ceiling or of the overcharge. We contend that the charge for 50 pounds was the same as 100-pound sacks; it just being a matter of the potatoes being shipped in two 50-pound instead of one 100-pound sack and examination of the document introduced shows there were quite a number of these lots or items that were shipped in 50-pound sacks. We can't see the defendant is prejudiced at all, and we feel under Rule 15, where it says, [65]

"Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires";

also under (b), Rule 15, where it says,

"If evidence is objected to as the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merit of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits."

Were this a criminal matter, I think it might be quite different, but under the facts here it is merely a matter of whether or not these things were shipped in 50-pound or 100-pound sacks. It makes no difference in price; it makes no difference in quantity. On 25 pounds or less there is a package differential difference in cost; that might be all; but not with 50 pounds. We can't see that it would be prejudicial one way or the other.

Mr. Lerner: If your Honor please, we feel that it would be prejudicial in this respect; in the first place, the statute is not strictly remedial, but is penal in nature, and being penal in nature, it should be construed more strictly. In the second place, is the fact that the [66] statute of limitation has run, for bringing an action in a treble damage suit. Now, to bring in an issue, which was not in the original issue, is now amending it to bring in something which is barred by the statute of limitations. Therefore I think the Court should not permit an amendment to the complaint.

Mr. Handy: I take issue with counsel as to the fact that the statute has run. These particular potatoes were included in the complaint. The only thing is, the complaint alleges they were in 100-pound sacks, whereas the evidence introduced shows that some were in 50-pound sacks. We have sued for these particular potatoes, and the only question is as to whether they were put up in smaller sacks.

(Further discussion.)

The Court: I will deny the government's motion, and allow the government an exception.

DAVE SMITH,

called as a witness by and on behalf of the plaintiff, resumed the stand, having been previously duly sworn, testified further as follows:

Direct Examination

(Continued)

By Miss Marten:

Q. I believe that we had just introduced Plaintiff's Exhibit No. 1 in evidence, and that was the schedule of ceiling prices which you had computed. Now, referring

(Testimony of Dave Smith)

to Plaintiff's Exhibit No. 2, referring to Column 5 thereof, [67] which is entitled 21% Mark-up Ceiling Price, can you tell me where the ceiling prices in Column 5 of all of the pages of Plaintiff's Exhibit 2 came from?

A. The ceiling prices came from a computation of ceiling prices appearing on Exhibit 1. It is merely a transposition. The same would be true for the ceilings indicated as 9-1/2 per cent on the other pages.

Q. In other words, for the sales that were made, service and delivery, you took the ceilings and calculated it for the service and delivery ceiling?

A. That is right.

Q. For the sales that were made cash and carry, did you use the ceilings as calculated for the cash and carry sales?

A. Well, they were a 9-1/2 per cent mark-up, and the ceiling for them is indicated on the exhibit, but for the non-delivery sales it was transposed onto these documents.

Q. In other words, your calculation of ceilings in Exhibit 1 was used and applied in Plaintiff's Exhibit 2, in Column 5? A. That is right.

Q. Column 6 is entitled: Overcharge per sack. Where did that figure come from, throughout Exhibit 2?

A. That is the difference between Columns 4 and 5; the difference between the selling price and the ceiling price, computed by me. [68]

Q. Column 7 is entitled: Total Overcharges. Where did the figures come from in that column?

A. That is the figure which results from the multiplication of the number of units, for example on Lot No. 706 there would be 74 units, at 33 cents per unit, which results in an overcharge of \$24.42.

(Testimony of Dave Smith)

Q. In other words, Column 6 is the overcharge per unit, and No. 7 is the total overcharge for the number of sacks sold in the particular sale listed?

A. That's right.

Miss Marten: Mr. Lerner, at this time would you like to stipulate that Columns 5, 6, and 7, be admitted into evidence in Exhibit 2? They were excluded by our prior stipulation, it seems. We have now stipulated to the admission of the calculations and ceilings on Exhibit 1 and Columns 5, 6 and 7 are merely a transposition of those figures. Can we now stipulate that all of this Exhibit 2 be admitted into evidence, insofar as it is a correct, calculation mathematically by Mr. Smith, and also correct as to the method used by Mr. Smith when he made the calculation?

Mr. Lerner: Let me understand this clearly: In other words, the 21 per cent mark-up ceiling price, or 9-1/2 per cent, as the case would be, Exhibit 2 is actually the ceiling price that he determined, based upon the theory that he was taking the country shipper price plus what you contend was the maximum ceiling price for the freight, minus the [69] customary variations for grade and size?

Miss Marten: That is right.

Mr. Lerner: And that is doesn't represent the shipper's price plus the actual freight paid?

Miss Marten: That is right.

Mr. Lerner: I have no objection to stipulating that the amounts, insofar as they affect 100-pound sacks, as shown on the 5th column of Exhibit 2, were amounts computed by the investigator, Mr. Smith, using the basis of a country shipper plus the variations for the grades and size and service, plus a maximum price ceiling, al-

(Testimony of Dave Smith)

leged maximum price ceiling of 18 cents per hundred-weight for freight, and that it does not constitute any other basis.

The Witness: There would be some 22 cent freight calculations.

Mr. Lerner: With the exception of those cases where you might have used 22 cents freight, I have no objection to stipulating to that, and the resulting alleged overcharge is merely a matter of mathematical deduction.

Miss Marten: For whatever aid it will be to the Court, it is admitted.

The Court: Does the government accept the stipulation?

Miss Marten: Yes, I do.

Mr. Lerner: May I state this, your Honor, that this stipulation is entered into by the defense on behalf of the defendants whom I am representing? There is doubt in my [70] mind as to whether in the stipulation as to Exhibit 2, whether to stipulate these were sales we made, or were sales by the Victory Produce Company. I would like to have it clearly understood that the sales were made by the Victory Produce Company, and all the stipulation is with respect to sales made by the Victory Produce Company, not the defendants I am representing.

Miss Marten: In other words, this is a transcription of the record of the Victory Produce Company?

Mr. Lerner: That is correct.

Miss Marten: That is satisfactory with us.

Mr. Lerner: So stipulated.

Miss Marten: I offer the matters contained in Exhibit 2 into evidence.

The Court: It may be received subject to stipulation.

(Testimony of Dave Smith)

(The document referred to was marked Plaintiff's Exhibit 2, and was received in evidence, subject to stipulation.)

Q. By Miss Marten: During the course of your investigation of the records of the Victory Produce Company did you learn from your investigation to what types of persons the Victory Produce Company was making sales of potatoes?

A. Their records have the names of the vendees thereon, and many of the vendees are known to me as wholesalers and retailers.

Miss Marten: Will you stipulate, Mr. Lerner, that the [71] Victory Produce Company makes sales to persons in the course of trade or business, and not to the ultimate consumers?

Mr. Lerner: For the purpose of jurisdiction?

Miss Marten: Yes.

Mr. Lerner: I will stipulate that the Court has jurisdiction.

The Court: You can't stipulate to jurisdiction, unless the facts establish it.

Mr. Lerner: That is right, your Honor. I will stipulate, insofar as the defendants I am representing are concerned, that so far as my knowledge goes the sales were made by Victory Produce Company in the course of their business.

Miss Marten. And to persons who purchase in the course of trade or business?

Mr. Lerner: Yes.

Miss Marten: The government will accept that stipulation, your Honor.

The Court: All right.

(Testimony of Dave Smith)

Miss Marten: Would you stipulate, Mr. Lerner, under the definition of Maximum Price Regulation 271 the defendants were intermediate sellers?

Mr. Lerner: No.

Miss Marten: Would you stipulate that the defendants made both cash and carry sales, and service and delivery sales, in the customary course of business?

Mr. Lerner: No, I won't stipulate that. My defendants [72] do not make any sales. Victory Produce Company may have made sales both ways.

Q. By *Mr. Marten*: From your investigation of the records of the Victory Produce Company, Mr. Smith, can you tell us if the defendants, during the period of April and May, made cash and carry sales of early white potatoes?

A. Well, from the records, and from the contact of persons making purchases, I can say that they made sales where the purchaser picked the merchandise up; that the Victory Produce Company also made sales where the Victory Produce Company delivered the merchandise to the premises where they were to be resold by the retailers.

Q. To your knowledge did they customarily make both types of sales, or were they just incidental?

Mr. Lerner: I object to the question as ambiguous, as to what is meant by the word "they"; which defendants?

Q. By *Miss Marten*: Did the Victory Produce Company customarily make both types of sales, or were they incidental?

A. To my knowledge they customarily made both types.

(Testimony of Dave Smith)

Mr. Lerner: If your Honor please, I am going to object to the answer upon the ground that it is not responsive. Can I get the word "they" cleared up?

The Witness: To my knowledge the Victory Produce Company made both types.

Miss Marten: That is all for the plaintiff in respect [73] to Mr. Smith.

Cross Examination

By Mr. Lerner:

Q. Mr. Smith, in the course of your investigation did you find any sales made by Mr. Sherman or Mr. Jung individually, or were all the sales by Victory Produce Company?

A. Well, the only sales I found were made by Victory Produce Company.

Q. And all the figures, compilations, and summarizations you have testified to, that you compared, or had compared either yourself or under your direction, were the result of findings of sales by the Victory Produce Company, is that correct?

A. That is correct, Mr. Lerner.

Q. I show you here what constitutes 7 Federal Register for the year 1942, bound, and taken from the library, and I direct your attention to page 9179. You worked under this particular regulation, is that correct—Maximum Price Regulation 271? A. That is correct.

Q. Under this regulation you computed the ceiling prices as you testified to, that were submitted here as an exhibit, is that right? A. That's right.

Q. 1351.1002 reads: "How a country shipper established [74] his maximum price for a perishable food commodity, as set forth in Appendix A"? A. Yes.

(Testimony of Dave Smith)

Q. 1351.1003 sets forth "How an intermediate seller calculates his maximum prices for perishable food commodities listed in Appendix B"? A. That's right.

Q. Does 1351.1003, which governs maximum prices for intermediate sellers, say anything in there about taking the country shipping base price, and adding variations?

Miss Marten: I object to that question, as immaterial. The record is a matter of judicial notice in this court.

Mr. Lerner: I think it is further argumentative, and I will withdraw that, your Honor. I have it here if the Court wishes to see it.

The Court: That is satisfactory to the Court.

Mr. Lerner: 7 Federal Register, with the original Act. I have it here, your Honor. No further questions, your Honor.

Redirect Examination

By Miss Marten:

Q. Have you ever made any other investigation at the Victory Produce Company in addition to the one which you have testified about today?

A. Yes, I have been there on other occasions.

Q. On numerous occasions? [75]

Mr. Lerner: If your Honor please, I believe these questions are immaterial, as to what other investigations may have been made.

The Court: I don't know, counsel, until we get the question developed. It may pertain to this; I don't know.

Mr. Lerner: I will withdraw my objection.

Q. By Miss Marten: Would you say these other investigations were numerous?

(Testimony of Dave Smith)

Mr. Lerner: I object to the question upon the ground that it is prejudicial.

Miss Marten: I withdraw the question.

The Court: Not numerous. Ask how many.

Q. By Miss Marten: How many times would you say you made an investigation of the Victory Produce Company?

Mr. Lerner: I am going to object to that question upon the ground that it is ambiguous, in that it does not state what the investigations were for; whether they were for potatoes.

The Court: Limit it to potatoes; that is all this Court is interested in at this time.

Miss Marten: I will withdraw the question, and re-frame it.

Q. In the course of your duties as investigator with the O. P. A., did you have occasion to visit the Victory Produce Company's wholesale business?

A. I did, yes. [76]

Q. Just tell us in round figures how many times during the period that you were an investigator, have you visited the Victory Produce Company.

The Court: In connection with potatoes.

The Witness: Well, I would construe all of these as one investigation, but I came and went several times. I don't know if that is what you mean.

Q. By Miss Marten: The purpose of my question is to lead up to this question: During the times that

(Testimony of Dave Smith)

you were present at the Victory Produce Company did you observe the various employees and persons there making sales of potatoes?

A. Oh, I observed some sales of potatoes.

Q. Did you ever see Marty Sherman making a sale of potatoes?

Mr. Lerner: I am going to object to that question on this ground: That the sales of potatoes in issue were sales made during the period approximately April 12 to April 27. The testimony of Mr. Smith was that the first time he came there was in June. Therefore, it is after the period involved in this case, and would be immaterial and irrelevant.

The Court: That objection is good. He might have sold potatoes a year later; that would not establish the sale of potatoes the year before.

Mr. Lerner: The witness further has already testified that Mr. Sherman had not made any of these sales himself.

Miss Marten: Do you sustain the objection? [77]

The Court: Yes. I don't think the fact that he saw him make sales is material. He might not have owned the business, and made sales, sold potatoes a year later; that would not establish the allegations of this complaint a year before.

Q. By Miss Marten: Do you know what people make up the Victory Produce Company? Who own it?

A. Who the present owners are?

Q. Yes. A. I am sorry, I don't.

(Testimony of Dave Smith)

Q. Do you know who owned the Victory Produce Company during April and May, 1943?

Mr. Lerner: If your Honor please, that has been admitted by the pleadings.

Q. By Miss Marten: Mr. Smith, in your testimony here today you stated that these records were the records of the Victory Produce Company—the ones that you investigated. How do you know they were the records of the Victory Produce Company?

Mr. Lerner: That is argumentative. She is arguing with her own witness; I think it is objectionable on that ground.

The Court: That is calling for a fact; how does he know? How do you know these are records of the Victory Produce Company?

The Witness: Your Honor, I went to the Victory Produce [78] Company. I asked to see their records there; I mean the records of the Victory Produce Company. Those records were the ones that were furnished to me I believe in response to my request for records. Upon that I believe these were records that I did see.

The Court: That is not responsive. I will ask the reporter to repeat the question and answer.

(Record read by the reporter.)

The Court: That is responsive: all right.

Miss Marten: That is all with this witness.

The Court: Call your next witness.

(Witness excused.)

Miss Marten: Will Mr. Sherman take the stand?

Mr. Lerner: Is this under 2055, or a witness under subpoena?

Miss Marten: Under 2055.

MARTY SHERMAN,

a witness called by and on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Marty Sherman.

Direct Examination

By Miss Marten:

Q. Mr. Sherman, what is your occupation?

A. Wholesale fruit and produce.

Q. How long have you been engaged in that business? [79]

A. About 22 years.

Q. Under what name do you carry on this business?

A. Under what name?

Q. Yes. Do you carry on your wholesale business under the name of Marty Sherman?

A. No, I do not.

Q. What name do you carry it on under?

A. Victory Produce Company.

Q. How long have you carried on a wholesale produce business under the name of Victory Produce Company?

A. Well, I personally haven't carried that business under my name at all. I happen to be a partner in the Victory Produce Company for the past year and a half.

Q. When did you first become a partner in the Victory Produce Company?

A. April 5, 1943.

Q. Who were the other partners with you in the Victory Produce Company at that time?

Mr. Lerner: If your Honor please, I am going to object to this question, upon the ground that it is immaterial; further for the reason that the Victory Produce Company is not a party defendant to the action. He is being sued here individually, and doing business as Victory Produce Company. He can testify as to what he

(Testimony of Marty Sherman)

was doing; but I submit, your Honor, that the company is not a party before the Court, and that the issues are not before this Court insofar as the [80] partnership is concerned.

The Court: Overruled. Exception allowed the defendants. Proceed.

Miss Marten: Answer the question.

(Question read by the reporter.)

The Court: That was April 5, 1943, Mr. Sherman?

The Witness: Yes, your Honor.

A. Marvin Berry and Jim Jung.

Q. By Miss Marten: Is Jim Jung still a partner with you in the Victory Produce Company? A. Yes.

Q. Is Marvin Berry still a partner with you in the Victory Produce Company? A. No.

Mr. Lerner: If your Honor please, I am going to object to that question upon the ground that there is a different Victory Produce Company now than there was in existence at the time this action was filed.

The Court: That is what we are trying to find out.

Miss Marten: I will withdraw that, and reframe it.

What was the last question?

(Question read by the reporter.)

Mr. Lerner: The question of who constitutes the partners is not denied by the pleadings. Under Paragraph 4, page 2, of plaintiff's pleading, it is alleged:

"At all times mentioned herein defendants Jim [81] Jung, Marty Sherman and Marvin Berry were co-partners doing business as Victory Produce Company,"

and in the answer of the defendants, which they have filed, this was not denied. The question, therefore, is immaterial at this time.

(Testimony of Marty Sherman)

The Court: If it is admitted, then you don't need to ask him.

Miss Marten: We will accept the stipulation of the pleadings, that they are in that form.

The Court: All right.

Q. By Miss Marten: How long did the partnership of yourself, Jim Jung and Marvin Berry, which you formed on April 5, 1943 continue in existence?

A. Roughly, about two weeks, but the dissolvment was not completed until some 75 days after we got together, I believe.

Mr. Lerner: If your Honor please, it is a matter of record. The record speaks for itself. I am willing to stipulate that on September 30, 1943, the partnership, consisting of Jim Jung, Marty Sherman and Marvin Berry, was dissolved of record.

Miss Marten: We will accept the stipulation, your Honor.

Q. By Miss Marten: During April and May of 1943, Mr. Sherman, did you personally make any sales of potatoes in the wholesale produce business? [82]

A. No, ma'am.

Q. How did you make the sales of potatoes in your wholesale produce business?

A. We had a potato salesman there that handled all the potato sales during that period.

Q. What was his name?

A. David Rosen, I believe.

Q. Was he the only man that sold potatoes at that time?

A. I wouldn't be in a position to say that, because there were 8 or 9 other salesmen around the house that may have sold some besides what he did.

(Testimony of Marty Sherman)

Q. Did Mr. Jim Jung, one of your partners, ever personally make any sales of potatoes?

A. So far as I know, I don't think he did.

Q. What about Marvin Berry?

A. He was never there.

Q. Do you know what persons the sales were made to during April and May, 1943, in a general way?

A. They were made to everybody who sold them.

Q. Were they made to other wholesalers?

Mr. Lerner: If your Honor please, the record speaks for itself, as to whom sales were made, and that would be the best evidence. I further object upon the ground that it is immaterial as to whom they were made.

Miss Marten: We did not read any records themselves [83] into evidence. We merely have a summary and the testimony of the witness.

Mr. Lerner: Plaintiff is attempting to rely upon the summary of their own witness, their own agents. We stipulated and permitted them to rely upon that testimony, and I don't see why they should go back on their testimony at this time.

Miss Marten: The purpose of asking this question, your Honor, is, I understand counsel does not care to stipulate that the Victory Produce Company was selling potatoes as an intermediate seller.

The Court: That is right. Proceed.

Q. By Miss Marten: Did the Victory Produce Company make sales to other wholesalers?

A. They made a lot of sales. Some wholesalers may have bought some, but the biggest majority of them were sold to retailers.

(Testimony of Marty Sherman)

Q. Did the Victory Produce Company make cash and carry sales to both wholesalers and retailers?

A. I don't know what constitutes a cash and carry sale.

Q. Did the Victory Produce Company makes sales to persons who came to your place of business and picked up the merchandise and paid cash to the Victory Produce Company?

A. The Victory Produce Company made sales of potatoes to people who came into the store, for cash, which were [84] delivered to them, yes. Nobody picks anything up at the Victory Produce Company but what the Victory employees don't deliver.

Mr. Lerner: If your Honor please, I think we are going to get into some technical questions as to what constitutes delivery, and what does not. I am willing to stipulate to this, your Honor: I stipulate on behalf of my defendants that insofar as we know Victory Produce Company as a company made sales to retailers and to other wholesalers; that in some instances some of the sales were sold and cash was paid at the time of the sale, and in other cases sales were made, and were charged upon the books, and collected under the usual or customary market terms.

Miss Marten: We accept that stipulation. Would you stipulate that some of the sales were picked up at the Victory Produce Company, and other sales were delivered by the Victory Produce Company?

Mr. Lerner: If we agree on the question of delivery. —in all cases there has to be a technical delivery, and in some cases the potatoes were delivered by the Victory Produce Company, to the best of our knowledge.

(Testimony of Marty Sherman)

Miss Marten: We will accept that stipulation.

Mr. Lerner: And picked up at the dock after it was delivered to the customer. In other cases motor vehicles and hand trucks were used to make deliveries of the potatoes away from the premises. Whatever the legal effect of that [85] would be, is something I would not stipulate to.

Miss Marten: You will stipulate to those facts?

Mr. Lerner: Yes.

Miss Marten: The government will accept the stipulation of facts.

The Court: All right.

Q. By Miss Marten: Mr. Sherman, can you tell us how you arrived at your ceiling price for potatoes which the Victory Produce Company sold during April and May, 1943?

A. Well, we based the cost of the potatoes delivered to Los Angeles.

Mr. Lerner: I am going to object to that question upon the ground that the question calls for an answer which affects not Marty Sherman individually, insofar as he is concerned. Any testimony that he as an individual would give would not bind him as an individual. It calls for action done by the partnership. The partnership is not a defendant to the action. Therefore, it is immaterial as to how they did it, or what they did.

The Court: Overruled. How did you fix the cost of your potatoes?

The Witness: On the purchase price delivered to Los Angeles. We then added ours, according to the O. P. A. ruling, of 21 per cent for potatoes that we delivered, and 9-1/2 per cent for the potatoes that were sold at the dock.

Miss Marten: That is all, Mr. Sherman. [86]

Mr. Lerner: No further questions, your Honor.

Mr. Handy: May it please your Honor, I understand from Miss Marten those are all the witnesses we have here at the present time. However, there was a question raised this morning; I think at least it was hinted at in counsel's cross examination of one of the witnesses, as to the availability of cars by the common carrier, by the railroad. The railroad man said he was not able to testify whether there were any available. Our contention, our theory, is that that burden is placed upon the defendants, and not upon us. I don't think we have to show that the railroad company at a particular time did not have a certain number of cars on the track. We would have to know what they wanted to ship; how they wanted to ship, and all that knowledge would be knowledge of the defendants. We believe the Court must take judicial knowledge that a public carrier, such as a railroad, has cars for the needs of the public. If that is not true, I think it is on the defendants to show that.

The Court: Weren't all the deliveries from the Bakersfield area made by truck?

Mr. Handy: They were made by truck. I think one question of law we are going to have to argue is not only whether or not 18 or 30 cents truck price was correct, but whether any of this was because, even though they shipped by truck, they should not have taken the common carrier's 22 cents—15 plus 7. That is something we will point out to your [87] Honor when we come to analyze the regulation. We have called a railroad man to come down here, who can testify in a general way what cars were available, and so forth, at this particular time. We don't want to do that unless your Honor feels it is incumbent upon us. If there is any reason to believe that

there were not available cars by a common carrier, such as the Southern Pacific, or the Pacific Fruit *Exchange*, I think it would be upon the defendants to show that.

(Discussion.)

The Court: I just wanted your general theory. Proceed.

Mr. Handy: We rest, your Honor.

Mr. Lerner: If your Honor please, at this time I would like to renew my motion to strike, and go into a discussion of that matter. I would like to move, your Honor, that all the evidence presented by plaintiff in this action, insofar as it reflects or shows sales or transactions made by Victory Produce Company as such be stricken from the record for the reason that the Victory Produce Company is not a party defendant to the action here, and is not before the Court at this time; that the Court would have no jurisdiction to render judgment against the Victory Produce Company as a company.

Los Angeles, California, Wednesday, November 1, 1944. 2 P. M.

Mr. Lerner: If your Honor please, at this time I would like to renew my motion to strike, and go into a discussion of that matter. I would like to move, your Honor, that all the evidence presented by plaintiff in this action, in so far as it reflects or shows sales or transactions made by Victory Produce Company, as such, be stricken from the record for the reason that the Victory Produce Company is not a party defendant to the action here, and is not before the court at this time; that the court would have no jurisdiction to render judgment against Victory Produce Company as a company.

I base my argument upon a reading of Rule 17, Federal Rules of Civil Procedure, which reads as follows; I have already read it once to the court, but for the purpose of continuity I will repeat it. Rule 17 (b):

“Capacity to Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, [94] which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States.”

And, therefore, clearly, under Rule 17 (b), in a case of this character, the court would be bound by the rules laid down by the State of California, and we would have to follow those rules. Looking to our California courts we find that in order to sue the Victory Produce Company, as a company, we must come within Rule 388 of the Code of Civil Procedure, which recites as follows:

“When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all of

the associates and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability."

California cases tend clearly to hold that a partnership is a legal entity for the purpose of suit, and in order [95] to bring the parties within the action, and in order to bring the partnership within the action, the Victory Produce Company must be named as a party defendant. That the manner in which the action was brought, in this case, is an action against individuals. The title reads as follows:

"Chester Bowles, Administrator, Office of Price Administration, Plaintiff, vs. Jim Jung, Marty Sherman and Marvin Berry, individually and doing business as Victory Produce Company, Defendants."

There is no action here against Victory Produce Company as a company, but merely against the individuals doing business as Victory Produce Company. I refer the court's attention to certain of the cases. We have here before us the case of *Artana v. San Jose Scavenger Co.*, 181 Cal. 628. I would like to read from the actual cases, if I may, your Honor.

In this action there was a demurrer to the complaint.

"The action was brought against the copartnership alone as a legal entity, under the provisions of Section 388 of the Code of Civil Procedure, which provides that 'when two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common

name, the summons in such cases being served on one or more of the associates.' Concededly the [96] provisions of this section authorize an action against a copartnership by its common name, the section recognizing a copartnership as a distinct legal entity for the purposes thereof. The action was one to have the interest of the plaintiff, claimed to have been acquired by purchase at an execution sale of the interest of one of the partners in the copartnership, ascertained, and for an accounting. The record does not show how summons was served on the partnership defendant, or, indeed, that it was ever served on any of the partners. However, a demurrer was interposed to the complaint by one Peter Devincenzi who was not named in the complaint, describing himself as 'sued as Santa Fe Scavenger Company, a copartnership.' This demurrer purported to be the demurrer of the said Devincenzi alone, as an individual, and did not purport to be the demurrer of the defendant partnership. Plaintiff thereupon made a motion for an order striking such demurrer from the files on the ground that Devincenzi is 'a stranger to the action and not a party thereto and upon the further ground that the said demurrer is sham.' This motion was denied. The demurrer was thereafter sustained and judgment given 'that plaintiff take nothing by his said complaint,' and 'that the said [97] action be dismissed.' This is the judgment appealed from.

"We see no good answer to the claim of appellant seasonably made, and ever since insisted on, that the attempted demurrer was not entitled to be considered. It did not purport to be the demurrer of any party to the action, for the only party de-

fendant was the Santa Fe Scavenger Company, a partnership, which, for the purposes of the statute (Code Civ. Proc. Sec. 388) is regarded as a legal entity distinct from its members. Although, by virtue of the amendment of the section in 1907, the judgment in an action so brought binds not only the joint property of the associates, but also the individual property of the party or parties served with process, it is still true that the action contemplated by the section is one against the associates as such to enforce a claim existing against the association, and is not an action against the individual members of the association; that is, unless they are as individuals, made parties thereto. The association, whether it be a copartnership or other association of individuals transacting business under a common name, is, for the purposes of the section, a legal entity distinct from its [98] members, and it is this legal entity which is in this action the sole party defendant.

“See, generally, *Bollman Co. v. Bachman & Co.*, 16 Cal. App. 589, 591. The record does not show that Devincenzi was one of the associates or partners, and the complaint does not purport to state any cause of action against him. So far as the record shows he is an absolute stranger to the action. Certainly his demurrer as an individual is not the demurrer of the sole defendant in the action, viz., the Santa Fe Scavenger Co., a copartnership.”

This case clearly brings out, if your Honor please, first, that there is a separate distinct entity. It is the reverse of the position we have here. However, it is one of the leading cases confirming the doctrine of a distinct entity.

I would like to cite the case of *John Bollman Co. v. S. Bachman & Co.*, 16 Cal. App., 589. In this action, the original action was by The John Bollman Company, a corporation, Plaintiff, vs. S. Bachman & Company, a copartnership. I might state briefly, without reading it, the substance of it.

In this action no attempt was made in the original complaint to allege who comprised the copartnership. The prayer was for judgment against "the defendant." The action [99] was brought under Section 388, Code of Civil Procedure. After the Statute of Limitations had run against the action the plaintiff filed an amendment to his complaint, and in the amended complaint he changed the title to read "The John Bollman Company, a corporation, Plaintiff, vs. S. Bachman & Company, a copartnership, Simon Bachman and Arthur Bachman, copartners doing business under the firm name of S. Bachman & Company, Defendants." Now, we then had in the amended complaint S. Bachman & Company, a fictitious firm name, a copartnership; we also in addition to that had the individual copartners doing business under the firm name of S. Bachman & Company, defendants, instead of the above. The amended complaint also contained appropriate allegations charging the individuals, Simon Bachman and Arthur Bachman, copartners doing business under the firm name of S. Bachman & Company.

A demurrer was filed by Arthur Bachman and Simon Bachman to the amended complaint. The demurrer was sustained without leave to amend. A judgment was entered against S. Bachman & Company, a copartnership. The court held in that case that both questions were to be answered by the question of whether or not the amended complaint brought in new defendants. Appellant

contended that there was no new cause of action stated by the amended complaint, but contended that by the addition of Simon Bachman and Arthur Bachman as parties defendant new parties were brought in, [100] and it was merely an elaboration of the name of the defendant company. The court said:

“While it is true that the section says the associates may be sued by such common name, the whole section indicates that the action in substance is an action against the associates as such and not against the individuals. The section recognizes the association, or, as in this case, the copartnership, as a distinct entity, against which the partnership obligation may be enforced. In an action brought as this was, the partnership is the only defendant.”

And that by naming the defendants, Arthur Bachman and Simon Bachman, copartners doing business under the firm name of S. Bachman & Company, it constituted bringing in separate parties, new and distinct parties, separate entirely from the defendant company as a company; and the sustaining of the demurrer was thereupon affirmed.

We have a similar situation in this case, your Honor. The case here is against Jim Jung, Marty Sherman and Marvin Berry, doing business as Victory Produce Company. Under the ruling in *Bollman vs. Bachman* they are not suing the partnership as the legal entity; they are suing the individuals. The words have been held to mean they are words of description, showing the nature of their operation, but the actual partnership is not a party to the action; that the action is [101] one against the individuals as such.

Now, we have the case of *Mary J. Craig v. San Fernando Furniture Co.*, 89 Cal. App. 169. This was an action which arose out of an automobile collision. The original action was against the San Fernando Furniture Company, a corporation, and Ira E. Stewart, an employee who was driving the truck for the defendant corporation. After the filing of the action, and after the Statute of Limitations had run, plaintiff filed an amendment to its complaint reading:

"Mary J. Craig, Plaintiff, v. San Fernando Furniture Company, Alex Cohen, Louis Cohen and Morris Cohen, copartners doing business under the firm name and style of San Fernando Furniture Company, and Ira E. Stewart, Defendants."

The first paragraph of the amended complaint was changed to read as follows:

"That at all times mentioned herein the defendant San Fernando Furniture Company was and now is a copartnership; that Alex Cohen, Louis Cohen and Morris Cohen are the names of the persons comprising such copartnership and that said Alex Cohen, Louis Cohen and Morris Cohen now are and at all times mentioned herein were associated together in the retail furniture business in the City of Los Angeles, California, transacting such business under the firm name [102] and style of San Fernando Furniture Company: that said associates Alex Cohen, Louis Cohen and Morris Cohen are sued herein under said firm name and style of San Fernando Furniture Company pursuant to Section 388 of the Code of Civil Procedure of the State of California.

“That at all times mentioned herein the defendant Ira E. Stewart was the employee of said San Fernando Furniture Company, a copartnership, and of Alex Cohen, Louis Cohen and Morris Cohen, doing business under the firm name of San Fernando Furniture Company and that said Ira E. Stewart at all times mentioned herein was acting as a driver of the automobile truck belonging to said San Fernando Furniture Company and the said Alex Cohen, Louis Cohen and Morris Cohen, doing business under said common name.”

In this action the court held that there was no right on the part of plaintiff to amend the complaint; that it was beyond the Statute of Limitations; that by amending their complaint and bringing in the parties Alex Cohen, Louis Cohen and Morris Cohen, doing business under the common name of San Fernando Furniture Company, they were, in effect, bringing in new parties to the action; that they were separate and distinct from the legal entity, and confirmed the legal entity as provided by Section 388 of the Code of [103] Civil Procedure as it existed in California. The court went into considerable discussion with respect to comparative cases in other jurisdictions, but the principal rule of the entity of the partnership, as a separate and distinct entity was definitely recognized in this state, and that Stewart, who was an employee of the defendant company was, in effect, not an employee of the individuals, but was an agent of the company, and as such agent of the company he was not the agent of the individuals. They recognized that distinction; in other words,

he was the agent of a recognized legal entity, even from the standpoint of agency under the California Act. The court in that case cited numerous other cases, and also cited the Santa Fe Scavenger Company case. I might state this; on page 176 the court said:

“It is still true that the action contemplated by the section is one against the associates as such to enforce a claim existing against the association, and is not an action against the individual members of the association.”

I also cite the case of *Ferry v. North Pacific Stages*, 112 Cal. App. 348. This is the case of *W. J. Ferry vs. North Pacific Stages (a corporation) et al; Seattle-Portland-San Francisco Auto Stage Co. (a corporation)*; and after the complaint was filed it was discovered that the *Seattle-Portland-San Francisco Stage Co.*, instead of being [104] a corporation was a copartnership, and that the members of the copartnership were *D. M. Shattuck* and *John Doe Christie*. Summons was duly issued. An affidavit of service of summons was filed reciting that process in said cause was personally served upon “*Fred Gordon, a member of said association.*” *Fred Gordon* appeared personally and answered the complaint. The defendant *Seattle-Portland-San Francisco Auto Stage Company* did not appear or answer as a corporation, as an association, or at all. This was prior to the amendment to the complaint. Then they amended their complaint to include *Shattuck* and *Christie*, and they named them as follows: *D. M. Shattuck* and *John Christie*, doing business under the firm name and style of *Seattle-Portland-*

San Francisco Auto Stage Co. And in paragraph III of the complaint they further alleged:

“D. M. Shattuck, John Doe Christie * * * were at all times * * * and still are associated together and doing business under the firm name and style of Seattle-Portland-San Francisco Auto Stage Co.”

The court held in that case:

“The remaining question is, was the Seattle-Portland-San Francisco Auto Stage Company also made a party defendant as an association or partnership? Did the court have jurisdiction of this company as an association? It is true paragraph [105] III of the complaint further alleges, ‘D. M. Shattuck, John Doe Christie * * * were at all times * * * and still are associated together and doing business under the firm name and style of Seattle-Portland-San Francisco Auto Stage Co.’ It is also true the title to the complaint includes these last-named individuals as party defendants. The foregoing language clearly indicates it was the intention of the pleader to constitute these named individuals as party defendants. They are merely identified as doing business in the name of the Seattle-Portland-San Francisco Auto Stage Company. The company as a separate entity is not made a party defendant. To have included this last-named company as a party defendant independent of the individuals who are alleged to compose the organization, it should have been specifically named as a defendant. This was not done. Our courts have uniformly held, without exception, that similar descriptions of individuals as members of an

association or partnership, does not constitute the organization itself a party to the action. This is not an action pursuant to the provisions of Section 388 of the Code of Civil Procedure against the 'common name' under [106] which individuals are associated and doing business. (*Davidson v. Knox*, 67 Cal., 143; *Feder v. Epstein*, 69 Cal., 496, *Maclay Co. v. Meads*, 14 Cal. App. 363.)"

The Court: They are just along the same line?

Mr. Lerner: They are all along the same line.

The Court: There is no need to argue further on those.

Mr. Lerner: If the court is satisfied, there is no need of going into further detail on those.

The Court: No, if they are cumulative cases.

Mr. Lerner: Might I point to the comparison the court makes in *Maclay Co. v. Meads*, wherein the court said this:—

The Court: You did not give the citation.

Mr. Lerner: 14 Cal. App. 363, 112 Pac. 195. The court in that case said this: It will be seen—

The Court: Counsel, I assume it is the same statement you have read; there is no need of reading these cumulative cases.

Mr. Lerner: I won't impose upon the court further. I will cite the cases of *Davidson v. Knox*, 67 Cal., 143; *Feder v. Epstein*, 69 Cal., 456, 10 Pac. 783; also a recent case, 1943, *Debois v. Hotel and Apartment Clerks' Union* 134 Pac. 2nd 328. That case is not exactly in point, but it does affirm the legal entity rule established in the previous cases.

We, therefore, find this, if your Honor please: That in the cases in California, and under Rule 17 (b), in order for the plaintiff to have established a case against the [107] Victory Produce Company, they must have shown that the defendants Marty Sherman, Jim Jung and Marvin Berry, as individuals, made sales in violation of the price ceiling. Without conceding for one moment that any violation did take place, the fact still remains, if your Honor please, that they have no party defendant here before the court by the name of Victory Produce Company. They don't have all of the defendants who composed the Victory Produce Company. They only have two of them before the court. They can't bind them jointly. Therefore, it is not possible to get judgment against the Victory Produce Company, and for that reason, any evidence as against the Victory Produce Company should be dismissed in so far as any action against the Victory Produce Company is concerned.

In view of the fact that all of the evidence tends to show sales made on transactions which took place by Victory Produce Company, rather than by individuals as such, in so far as this evidence introduced has no relationship or bearing, or establishes a case against the individuals, as individuals, the case against the individuals must be dismissed, and this motion is being made on behalf of the individuals as such.

Mr. Handy: I am sorry, your Honor, I am taken a little unawares by this motion, because I did not anticipate it. I did not draw the pleadings; the matter was never raised or discussed, and I am not as familiar as counsel is on this [108] particular issue. I may state at the beginning, if your Honor has any doubts about it, I would appreciate it if we might take the evidence, and

then be permitted to file a memorandum with your Honor. However, I will state this is not my pleading, but is a national form which has been wished on us. I don't particularly like the form of pleading myself. It isn't consistent with our usual California allegations, in the title, when we are suing a partnership, and I have made some changes in that regard heretofore, but not in this case.

Your Honor, of course, appreciates, having practiced long before the courts of California, that our rule in California is that we allege John Doe and Richard Roe individually, when we want to sue **them** individually, and John Doe and Richard Roe, a copartnership, doing business as the John Doe Company. That is the ordinary method of alleging both an individual and partnership liability.

In the action that we have here today, it is set up in the complaint the way it is in the title; that is, "Jim Jung, Marty Sherman and Marvin Berry, individually"; certainly, that makes them individual defendants, and the allegations of the complaint would apply to them individually. Then it goes on in the title and says "and doing business as Victory Produce Company." Then in paragraph IV of the complaint, the allegation is:

"At all times mentioned herein defendants Jim [109] Jung, Marty Sherman and Marvin Berry were co-partners doing business as Victory Produce Company, with the principal place of business located at 1124 South San Julian Street, Los Angeles, California,"

and that allegation is admitted by the answer.

The whole question then is, whether or not it is necessary to allege in the title, which is no part of the complaint, the fact that persons are a copartnership. Had we said "Individually, and as a copartnership doing business as Victory Produce Company" I take it there could be absolutely no question about the fact that both were brought in; but by leaving out in the title as to whether or not they were copartners, and this was a joint venture—it would seem very much as though it were a joint venture by the testimony on the stand—while they did have an agreement, one man came in at the beginning of the season, and went out at the end of the season; so it may either have been a joint venture, but whether or not, by failing to put in those words, "a copartnership doing business"—whether or not we have brought them in as parties is the question we are concerned with. Rule 9 (a) of the Federal Rules of Civil Procedure provides as follows:

"It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative [110] capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of a party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are particularly within the pleader's knowledge."

We believe that our pleading comes squarely within Rule 9 (a) of this court. We also believe it comes squarely

within the provisions of Rule 17 (b) quoted by the defendant. The capacity to sue or be sued, of course, is determined by the jurisdiction in which the court is located, but Rule 17 (b), as read by the defendants, states:

“except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States.”

I don't think that particularly applies, because in this state the capacity to sue comes under the provisions of the Code of Civil Procedure, which were read by the defendants, [111] and I think our pleading comes squarely under that section, because we have sued them individually, and by their firm name “Victory Produce Company.”

I intended, as a matter of fact, at the noon hour to run down some of these cases, but I did not get very far. There is a case in 13 Cal. App. (2d), 440. I looked at the digest, but I did not get a chance to read the case. I am not sure just what it holds, or whether it comes within the issues here, but the digest there seemed to be that where parties were sued, and the capacity was not mentioned, they had not brought in the partnership; but it does, if they had mentioned the partnership name, which in this case was Karl's. I don't know whether it is the Karl Shoe Company or not; but it would not be sufficient if they had merely designated the defendants as “Karl's doing business under the name of Karl's.” I am not very sure whether that would cover the situation, but I think we come squarely within the provisions of Rule

9 (a); if your Honor has any question about it, I would like to get the recent rulings on the matter.

The Court: I will hear the testimony.

Mr. Lerner: If your Honor please, I might say in connection with the case cited by counsel, that I have read that case, and that is a situation where they name a company without specifying the name. Then the evidence showed that the plaintiff bringing the action knew the name [112] of the defendant company, and merely hadn't specified the name. In other words, they sued a company composed of two parties who were mentioned, but it turned out that the company was Karl's, and was a co-partnership. They held that by using the words "and company" they had named a fictitious name, without naming the name of the company.

The Court: I will hear the testimony, without prejudice. Exception allowed [88]

Mr. Lerner: At this time, your Honor, I would like to make a motion for a dismissal and a nonsuit on behalf of the defendants named whom I am representing, upon the grounds that there has been no evidence, or, assuming that the evidence introduced is correct, it still does not establish a case against the defendants Marty Sherman or Jim Jung, either individually, or doing business as the Victory Produce Company. For the purpose of this motion, if your Honor please, I would like to repeat my arguments in connection with the situation of the partnership as to whether or not a partnership is brought in.

The Court: So understood.

Mr. Lerner: In addition to that, your Honor, I would like to point out to the court, if I may, that to determine whether or not plaintiffs have stated a cause of action,

assuming even their proof were correct,—whether or not they have stated a cause of action against Marty Sherman and Jim Jung, individually, and doing business as the [113] Victory Produce Company. I would like to call the court's attention first to regulation 271. In 7 Federal Register, 9179, the original regulation was published and made official. I might state this: There is only one amendment that affects the regulation as it was originally issued. That is No. 9, in so far as the issues before this court are concerned, and amendment No. 9 affects it only to the extent that there is a change in the event of icing car lots.

Miss Marten: I don't agree to that.

Mr. Lerner: I am sure; but I can bring in the amendment. Federal Register, Vol. 7, page 9179 sets forth price regulation 271 as follows:

“Certain perishable food commodities, sales except at retail.

“In the judgment of the Price Administrator it is necessary and proper, in order to effectuate the purposes of the Emergency Price Control Act of 1942, as amended, and Executive Order No. 9250, that maximum prices be established for the sale of certain perishable food commodities f. o. b. country shipping point, and at wholesale. The following regulation supersedes Temporary Maximum Price Regulation.”

However, going to the matter of the substance of the regulation we find as follows, if your Honor please: We have the regulation, or the body which is in a position to [114] establish the law. I recognize the fact that the regulation is the law, and the Administrator is the agent, bringing about the details, which are set out in Sections 1351.1001 to 1351.1018.

The Court: You are going too fast.

Mr. Lerner: The regulation sets out, and subdivides its substance into 18 subsections, each one separate, clear and distinct. First is subsection 1. When I say subsection 1, I mean this is 1351.1001. The numerical series are right at the end, and shows the applicability of this maximum price regulation.

“(a) Commodities to be priced under this regulation. This regulation applies to the following perishable food commodities:

“(1) All white flesh potatoes, whether used for human consumption or as seed potatoes.

“(2) All dry onions used for human consumption, produced in the calendar year 1942.

“(b) To what types of sellers this regulation applies. This regulation applies to country shippers and all intermediate sellers, as defined herein, of the commodities listed in paragraph (a) of this section, but does not apply to retailers.”

Subsection (c) of 1351.1001, states the purposes of this regulation as follows: [115]

“(c) Purposes of this regulation. (1) Appendix A sets forth maximum prices and repeats the applicable differentials set forth in Sec. 1351.1002 (b) for the country shipper, at the country shipping point, on board car or any other common carrier, for each variety and grade, in the month of sale and area in which the commodities were produced.

“(2) Appendix B sets forth the figures which different classes of intermediate sellers must use in calculating maximum prices.”

Then we have in (d) prohibition against sales above maximum prices.

Then we have 1351.1002. The first one from which I quoted is very general, covering all. Then 1351.1002 sets down:

“How a country shipper establishes his maximum price for a perishable food commodity, as set forth in Appendix A.”

The regulation goes to a great extent in showing how to establish the grades, varieties, sizes, size of package, services rendered, whether it is a delivered basis or country shipping point basis, what he may add, and what he has to deduct.

Sec. 1351.1003 is:

“How an intermediate seller calculates his [116] maximum prices for perishable food commodities listed in Appendix B.”

Now, 1351.1002 states how a country shipper shall arrive at his prices, and in 1351.1003 how an intermediate seller shall arrive at his prices, and we have a separate appendix to which he must refer. He is directed specifically, not to Appendix A, but Appendix B. In Section 1351.1003 we find first:

“For the purposes of this regulation ‘intermediate sellers’ are divided into the following classes.”

Then they define who is an intermediate seller:

“and the term means any wholesale seller, including, but not limited to terminal distributors, service and cash-and-carry wholesalers, carlot receivers, jobbers or any other person who purchases for the purpose of reselling, except country shippers and retailers.”

You will notice specifically that "country shipper" is set aside and distinguished from "intermediate seller" just as "retailer" is set aside and distinguished from "intermediate seller" and "country shipper". Then they say as follows:

"except country shippers and retailers, and who take title and make sales to any person who is not the ultimate consumer."

In other words, anyone between the country shipper and [117] the ultimate consumer, with the exception of the retailer, is considered an intermediate seller. There is no question in my mind that the Victory Produce Company, while they were selling potatoes, acted as intermediate sellers, because it was intended under the act that everybody be considered an intermediate seller. They are either in one group or the other. Then they attempt to define and separate into three classes all intermediate sellers. They say:

"(1) Class 1: Retailer-owned cooperative wholesaler. A retailer-owned cooperative wholesale is either a non-profit organization or a corporation, 51% or more of the stock of which is owned by its retail customers and which distributes food commodities for resale without materially changing their form."

Well, clearly that does not affect the problem before the court at this time.

"(2) Class 2: Cash and carry wholesalers. Cash-and-carry wholesaler is a wholesaler not in Class 1," that is, not a cooperative, "who distributes food commodities for resale or to commercial, industrial and institutional users without materially changing their

form and who does not customarily deliver or extend credit.

"(3) Class 3: Service Wholesalers. A service wholesaler is a wholesaler not in class [118] 1 who distributes food commodities for resale or to commercial, industrial or institutional users without materially changing their form and who customarily delivers, or delivers and extends credit to purchasers.

"(b) The intermediate seller shall calculate once every week on the day set forth opposite the name of the food commodity in Appendix B his maximum price for each variety and grade of such food commodity as follows:"

Assuming we are now an intermediate seller, the first step we must determine is how we start to determine our prices.

The Court: Counsel, I will have to go over those pretty carefully anyway, so I will hear the testimony. We will proceed with the case. I will allow you an exception without prejudice to making a motion, and I will hear argument at the conclusion of the testimony. [119]

The Court: I will hear the testimony. We will proceed with the case. I will allow an exception, without prejudice to make a motion, and I will hear argument again at the conclusion of the testimony.

Mr. Lerner: I would like to introduce the testimony of Mr. Sherman on behalf of the defendants I am representing.

MARTY SHERMAN

called as a witness by and on behalf of the defendants, having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Lerner:

Q. Mr. Sherman, you are one of the defendants named in this action? [89] A. Yes, sir.

Q. Do you, as an individual, and for your own behalf, buy any potatoes for the purpose of resale?

A. No, sir.

Q. Do you as an individual sell any potatoes or on your own behalf? A. No, sir.

Q. Do you have anybody working for you individually who sold any potatoes? A. No, I do not.

Q. The answer is no, I take it?

A. No, I didn't.

Q. Are you familiar, generally speaking, with the transactions of the Victory Produce Company during the period from April, 1943 to the latter part of May, 1943?

A. I am.

Q. Do you know how the Victory Produce Company arrived at its price ceiling on potatoes during that period?

A. I do.

Q. Will you tell the Court how they arrived at the price ceiling, to the best of your knowledge?

A. Well, there is only one way that they can arrive at the price ceiling, and that is by the purchasing of the potatoes. The Victory Produce Company purchased these potatoes from the country shipper on a delivered basis, at whatever the price was at the time of delivery. The Victory [90] Produce Company had the privilege of putting on their markups, which was O. K.'d by the O. P. A., of

(Testimony of Marty Sherman)

21 per cent on a delivered basis, and 9-1/2 per cent on what they call the cash and carry basis.

Mr. Handy: I object to the statement that they had the privilege of doing this.

The Court: He is a layman. He doesn't understand legal terminology. You mean that's the way you made your price?

The Witness: That is right, your Honor.

Mr. Lerner: No further questions.

Cross-Examination

By Mr. Handy:

Q. Mr. Sherman, when you spoke of being O. K.'d by the O. P. A., do you mean a particular price was submitted to the O. P. A., or are you referring to the provisions of the regulation?

A. Before we start selling any potatoes at the Victory Produce Company we contact the O. P. A.

Q. Who do you contact?

Mr. Lerner: If your Honor please, I believe that is immaterial, because any evidence they might introduce in that respect could not be binding against the government. The theory of estoppel is an improper theory. The rules and regulations provide, in order to get a price quotation binding the Office of Price Administration must be in writing, [91] and must be by a recognized authority of the Office of Price Administration. That very question came up, if your Honor please, in Judge Yankwich's court, and the court held that any statements that could possibly be made, or any conversation that could possibly have taken place between a citizen, and the Office of Price Administration, or its representative, unless it was in

writing, could have no possible legal effect, and therefore any statements made by the witness at this time have no legal effect, and should be excluded by the Court.

The Court: Proceed.

Mr. Handy: The position of counsel has saved considerable cross examination, your Honor. I think that is all. The plaintiff rests, your Honor. [92]

[Endorsed]: Filed Mar. 29, 1945.

[Endorsed]: No. 11035. United States Circuit Court of Appeals for the Ninth Circuit. Jim Jung and Marty Sherman, Appellants, vs. Chester Bowles, Administrator, Office of Price Administration, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed April 11, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Circuit Court of Appeals of the United States
Ninth Circuit

No. 11035

JIM JUNG and MARTY SHERMAN.

Appellants,

vs.

CHESTER BOWLES, Administrator, Office of Price
Administration,

Appellee.

STATEMENT OF POINTS

The appellants, Jim Jung and Marty Sherman, state that the points upon which they intend to rely on the appeal in this action are as follows:

1. The Trial Court erred in awarding a judgment against appellants, Jim Jung and Marty Sherman, because the partnership, known as Victory Produce Company, consisting of Jim Jung, Marty Sherman and Marvin Berry, which was the only entity against which judgment might have been awarded, was not a party to the action.

2. The Trial Court erred in determining that it was obligatory upon the "intermediate seller" to inquire into the propriety of the freight rate included by the "country shipper" in the price of the potatoes purchased by the "intermediate seller" upon a "delivered" basis.

3. The evidence was insufficient to support the judgment against appellants in the following respects:

- a. The evidence failed to show that the appellants, Jim Jung or Marty Sherman, made any sales of potatoes,

or that they were personally liable for any violations of the provisions of Maximum Price Regulation 271, as amended.

b. The evidence failed to show that the Victory Produce Company, as the "intermediate seller", sold in excess of its "ceiling price" within the meaning of the provisions of Maximum Price Regulation 271, as amended.

c. The evidence failed to show which of the sales made by the Victory Produce Company were upon a "service and delivery" basis and which were upon a "cash and carry" basis within the meaning of Section 1351.1018 of Maximum Price Regulation 271, as amended.

d. Appellee failed to introduce any evidence to show what the country shipper's "lowest available common carrier rate" was with respect to the potatoes shipped by him to the customary receiving point of the Victory Produce Company during April and May, 1943.

4. The Court erred in admitting and in refusing to strike out the following evidence:

a. The freight rates in April and May, 1943, charged for the shipping of potatoes from the Bakersfield area to Los Angeles, California.

b. The price charged by Edison Trucking Company, or any other trucking company, for the hauling of potatoes from Kern County to Los Angeles in March, 1942.

c. All evidence of sales during April and May, 1943, made by Victory Produce Company, which was not a party to the action.

d. All evidence introduced by appellee showing methods by which "country shipper" determines his maximum ceiling prices under the provisions of Maximum Price Regulation 271, as amended.

Dated, April 6th, 1945.

EDWARD M. RASKIN and
LOUIS LERNER

By: Edward M. Raskin
Attorneys for Appellants, Jim Jung and
Marty Sherman

[Affidavit of Service by Mail.]

[Endorsed]: Filed Apr. 11, 1945. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AND ORDER

Whereas, the cost entailed in printing plaintiff's Exhibits 1 and 2 as part of the printed record on appeal is burdensome, expensive and unnecessary, and

Whereas, said Exhibits are contained in the Clerk's transcript on appeal herein and they may be physically examined by the above entitled Court when necessary with the same force and effect as if printed as part of the record, and

Whereas, the parties to this appeal feel that the issues in the above entitled case may be adequately examined and decided by the above entitled Court without the necessity of printing said Exhibits as part of the record on appeal herein,

It Is Hereby Stipulated by and between Appellants and Appellee, through their respective counsel, that this Court order that the printing of plaintiff's Exhibits 1 and 2 as part of the record on appeal be dispensed with.

EDWARD M. RASKIN

Attorney for Appellants

ARLINE MARTIN

Attorney for Appellee

It Is So Ordered:

CURTIS D. WILBUR

Circuit Judge

[Endorsed]: Filed Apr. 13, 1945. Paul P. O'Brien,
Clerk.

No. 11035

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JIM JUNG and MARTY SHERMAN,

Appellants,

vs.

CHESTER BOWLES, *Administrator*, Office of Price Administration,

Appellee.

APPELLANTS' OPENING BRIEF

EDWARD M. RASKIN,

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Attorney for Appellants.

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No. 11035

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JIM JUNG and MARTY SHERMAN,

Appellants,

vs.

CHESTER BOWLES, *Administrator*, Office of Price Administration,

Appellee.

APPELLANTS' OPENING BRIEF.

Jurisdictional Statement.

On April 13, 1944, Chester Bowles, Administrator, Office of Price Administration, filed an action against defendants Jim Jung, Marty Sherman, and Marvin Berry, individually and doing business as Victory Produce Company, for treble damages pursuant to the provisions of Section 205e of the Emergency Price Control Act of 1942 (Public Law 421, 77th Cong. Second Sess., 56 Stat. 23) enacted January 30, 1942, contending that said defendants had during the period from April 12, 1942 to and including May 27, 1943, as intermediate sellers, sold and delivered at Los Angeles, California, early white potatoes, 1943 crop, in one hundred pound sacks, to wholesalers and retailers at a price in excess of the maximum price estab-

lished under the provisions of Maximum Price Regulation 271, as amended (7 Fed. Reg. 9179).

Mr. Louis Lerner filed an answer to the Amended Complaint on behalf of the three individual defendants, but Mr. Lerner later withdrew his appearance on behalf of defendant Marvin Berry, because of lack of authority to represent him, and pursuant to agreement between counsel for plaintiff and Mr. Louis Lerner, it was stipulated that Mr. Lerner represented only defendants Jim Jung and Marty Sherman. [Rep. Tr. pp. 20 and 21.]

The amended complaint appears in the Reporter's Transcript at pages 2 to 4, and the answer to the amended complaint appears at page 5.

On December 14, 1944, findings of fact and conclusions of law were signed by the trial court, and on the same day judgment was entered in favor of plaintiff and against defendants Jim Jung and Marty Sherman jointly in the sum of five thousand nine hundred seventy-seven and 18/100 (\$5,977.18) dollars.

On March 9, 1945, Notice of Appeal to the Circuit Court of Appeals was duly filed from said judgment by defendants Jim Jung and Marty Sherman.

The pertinent provisions of Maximum Price Regulation 271 involved in this appeal are as follows:

1. "Sec. 1351.1002. *How a country shipper establishes his maximum price for a perishable food commodity, as set forth in Appendix A.* (c) If a country shipper makes a sale of food commodities for delivery to a place other than his country shipping point, his maximum price shall be the price established by him under paragraphs (a) and (b) of this section and Appendix A, *plus the transportation charges he has actually paid*, at lowest available common carrier

rates, from his country shipping point to the place where the commodities are to be delivered. In no case shall the country shipper include transportation charges, whether paid by him or not, from the farm where the commodities were produced to his country shipping point."

2. "Sec. 1351.1003. *How an intermediate seller calculates his maximum prices for perishable food commodities listed in Appendix B—(b-4)* The intermediate seller shall then determine his 'net cost' of his 'largest single purchase' as defined above, of the food commodity being priced. '*Net cost*' means the amount he paid for the food commodity delivered at his customary receiving point less all discounts allowed him except the discount for prompt payment; however, no charge or cost for local unloading or local trucking shall be included."

3. "Sec. 1351.1004. *Information which each country shipper and intermediate seller must pass on to his purchaser.* Whenever a country shipper or an intermediate seller makes a sale and delivery after the effective date of this regulation, he shall supply in writing, to his purchaser on his invoice, sales ticket, cash receipt, or other written evidence of the sale, the following information:

(a) The variety of the food commodity being sold;

(b) The grade of the food commodity being sold;
and

(c) The selling price, not exceeding the maximum price, which the country shipper or intermediate seller has determined for the variety and grade being sold. *The invoice, sales ticket, cash receipt or other written evidence of the sale, when containing the above required information shall be deemed to be proper notification to the purchaser."*

Statement of the Case.

The action herein was brought by the Administrator of the Office of Price Administration against defendants Jim Jung, Marty Sherman and Marvin Berry, individually and doing business as Victory Produce Company. The Court will note that the action was *not* brought against the Victory Produce Company, a partnership, consisting of Jim Jung, Marty Sherman and Marvin Berry.

Marvin Berry was never served with process in the above action, even though his whereabouts were at all times known to plaintiff, and the only defendants who appeared in the action were the individual defendants Jim Jung and Marty Sherman.

On April 5, 1943, Jim Jung, Marty Sherman and Marvin Berry entered into a partnership known as Victory Produce Company which was dissolved on September 30, 1943. During the period from April 12, 1943 to and including May 27, 1943, neither the defendant Sherman nor the defendant Jung personally made any sales of potatoes in the wholesale produce business. All sales of potatoes were made by employees of Victory Produce Company, a partnership, consisting of Jim Jung, Marty Sherman and Marvin Berry.

During the aforesaid period the Victory Produce Company purchased potatoes on a "delivered" basis in one hundred pound sacks from country shippers located in the Bakersfield area. These potatoes were transported by contract carrier from the country shipping point to the Los Angeles docks of the Victory Produce Company located in the Los Angeles City Produce Market. The freight rate charged by the contract carrier to the country shipper for the transportation of said potatoes and

paid for by the Victory Produce Company to the country shipper as part of its "net cost" was the sum of thirty cents per hundred pounds.

The Victory Produce Company computed its selling price by determining its "net cost", to wit, *the amount it paid for the potatoes delivered at its customary receiving point, less all discounts allowed*, and then by multiplying its "net cost" either by 21% or by 9½%, depending upon whether the company made a "delivered" sale or a "cash and carry" sale, as the case might be. The company thus used the appropriate mark-up on its "net cost", which included the transportation charges actually paid, to wit, the sum of thirty cents per hundred pounds.

It is Appellee's contention that the Victory Produce Company in determining its "net cost" should not have included the figure of thirty cents per hundred pounds which was actually paid for transportation of the potatoes, but that it should have included instead the figure of eighteen cents per hundred pounds, because it is Appellee's position that the ceiling price for said service as performed by said contract carriers in the Bakersfield area should have been the sum of eighteen cents per hundred pounds, and that the Victory Produce Company bore the responsibility for making inquiry to ascertain that fact.

It is the contention of Appellants that the company complied with Maximum Price Regulation 271, Sections 1351.1001 to 1351.1005, inclusive, and that it was proper for the company to include in its computation of its "net cost" the actual freight charge paid for the services of the contract carrier, to wit, thirty cents per hundred pounds, and that it did not have to go behind the invoice, sales ticket or other written evidence of the sale presented to it by the "country shipper".

Specification of Errors.

Appellants specify that the following errors were committed by the trial court:

1. The trial court erred in awarding judgment against Appellants Jim Jung and Marty Sherman because the partnership known as Victory Produce Company, consisting of Jim Jung, Marty Sherman and Marvin Berry, which was the only entity against which judgment might have been awarded, was not a party to the action.

2. The trial court erred in determining that it was obligatory upon the "intermediate seller" to inquire into the propriety of the contract carrier freight rate included by the "country shipper" in the price of the potatoes purchased by the "intermediate seller" upon a "delivered" basis.

3. The evidence was insufficient to support the judgment against the Appellants in the following respects:

a. The evidence failed to show that the Victory Produce Company as the "intermediate seller" sold in excess of its ceiling price within the meaning of the provisions of Maximum Price Regulation 271, as amended.

b. Appellee failed to introduce any evidence to show what the country shipper's lowest available common carrier rate was with respect to the potatoes shipped by the country shipper to the customary receiving point of the Victory Produce Company during April and May of 1943.

c. The evidence failed to show that the Appellants Jim Jung or Marty Sherman made any sales of potatoes or

that they were personally liable for any violations of the provisions of the Maximum Price Regulation 271, as amended.

4. The Court erred in admitting and in refusing to strike out the following evidence:

a. The evidence of the common carrier freight rates in April and May, 1943, charged for the shipping of potatoes from the Bakersfield area to Los Angeles, California, should not have been admitted for the reason that it was completely immaterial to the issues of the case. [Rep. Tr. p. 14.]

b. Evidence of the price charged by Edison Trucking Company or any other contract carrier for the haul of potatoes from the Bakersfield area to Los Angeles in March, 1942, was inadmissible for the reason that it was immaterial, irrelevant and hearsay. [Rep. Tr. pp. 18, 19, 25 and 26.]

c. All the evidence introduced by plaintiff showing the methods by which the "country shipper" determines his maximum ceiling prices under the provisions of MPR 271, as amended, was inadmissible for the reason that it was immaterial, irrelevant, and no proper foundation was laid therefor. [Rep. Tr. p. 17.]

d. All evidence of sales of potatoes during April and May, 1943, made by Victory Produce Company, which was not a party to the action, was incompetent, irrelevant, and immaterial for the reason that the only parties before the Court were the individuals Jim Jung and Marty Sherman. [Rep. Tr. pp. 18, 19, 21, 52, 67, 75, 82-94.]

ARGUMENT.

I.

The Trial Court Erred in Awarding Judgment Against Appellants Jim Jung and Marty Sherman Jointly, Because the Partnership Known as Victory Produce Company, Consisting of Jim Jung, Marty Sherman and Marvin Berry, Which Was the Only Entity Against Which Judgment Might Have Been Awarded, Was Not a Party to the Action.

From the outset appellants herein have consistently maintained, and do persist in their contention, that if any violation of Maximum Price Regulation 271 was committed, it was committed by the partnership known as Victory Produce Company and not by the individual defendants who were sued in this action. It will be noted that the defendants named in this suit are "Jim Jung, Marty Sherman, and Marvin Berry, individually and doing business as Victory Produce Company". Victory Produce Company, a copartnership, has at no time been made a party to this action, nor has it ever been served with summons.

Under the law of the State of California on this point, where defendants are sued in their individual names, but are characterized as copartners and doing business under a firm name, the action is against the persons or individuals named and not against the partnership, although such names are followed by the description "partners doing business under" a designated firm name, such additional averments being considered mere *descriptio personae*.

Billings v. Finn, 55 Cal. App. 134;

Ferry v. Northern Pacific Stages, 112 Cal. App. 348.

Likewise, a copartnership comprised of individuals, transacting business under a common name, is for the purposes of Section 388 of the California Code of Civil Procedure a legal entity distinct from its members.

Craig v. San Fernando Furniture Company, 89 Cal. App. 167;

Ferry v. Northern Pacific Stages, 112 Cal. App. 348;

Potts v. Whitson, 52 Cal. App. (2d) 199;

Maclay Company v. Meads, 14 Cal. App. 363;

Bollman v. Bachman & Co., 16 Cal. App. 589;

Minchan v. Silveria, 131 Cal. App. 317.

The Court's attention is called particularly to the case of *Craig v. San Fernando Furniture Company*, 89 Cal. App. 167, wherein plaintiffs filed an action for personal injuries against San Fernando Furniture Company, a corporation, and Ira E. Stewart, who was alleged to be an employee of the company. More than one year after the accident, plaintiffs filed an amended complaint suing defendants "San Fernando Furniture Company, Alex Cohen, Louis Cohen and Morris Cohen, co-partners doing business under the firm name and style of San Fernando Furniture Company, and Ira E. Stewart, Defendants," and alleged that defendant Stewart was the employee of all the defendants named therein. The attorneys for defendants moved to dismiss and to strike said amended complaint upon the ground that plaintiff had brought in new legal entities therein. Said motions were granted by the trial court and plaintiff appealed. The California District Court of Appeals held, first, that in changing the designation of the San Fernando Furniture Company from that of a corporation to that of a copartnership, there was no

change in the defendant entity of San Fernando Furniture Company. In that connection the Court stated,

"It clearly appears from a reading of the original and amended complaint that the plaintiff at all times was urging her claim of damages against a business concern operating under the name of the San Fernando Furniture Company and which had in its employ as a truck driver, one Ira E. Stewart."

The Court further held as follows:

"There is considerable authority to support the proposition that where a firm is doing business under a common name, whether it be a partnership or other association of persons, the group relation as designated by the common name constitutes a separate legal entity from that of the individuals who form the group. . . . The trend of authority seems to support this view, although there are cases, particularly from other jurisdictions, that would justify a contrary line of reason."

Accordingly the judgment of dismissal as against the defendant San Fernando Furniture Company was reversed, but the judgment of dismissal as against Alex Cohen, Louis Cohen, and Morris Cohen was affirmed. It is therefore apparent that the defendant truck driver in the *Craig v. San Fernando* case was not the employee of the individual partners, but of the partnership known as San Fernando Furniture Company. Likewise, in the instant case, the salesmen who made sales of the potatoes were the employees of Victory Produce Company, the co-partnership, and not the employees of the individuals Jim Jung, Marty Sherman and Marvin Berry. The entity responsible for the acts of the employees was their employer Victory Produce Company which, for some reason known

only to the plaintiff, was not made a party defendant to this action.

To the same effect was the statement of the California District Court of Appeal, in *Ferry v. North Pacific Stages*, 112 Cal. App. 348 at page 351, as follows:

“The remaining question is, was the Seattle-Portland-San Francisco Auto Stage Company also made a party defendant, as an association or partnership? Did the court have jurisdiction of this company as an association? It is true paragraph III of the complaint further alleges, ‘D. M. Shattuck, John Doe Christie . . . were at all times . . . and still are associated together and doing business under the firm name and style of Seattle-Portland-San Francisco Auto Stage Co.’ It is also true the title to the complaint includes these last-mentioned individuals as party defendants. The foregoing language clearly indicates it was the intention of the pleader to constitute these named individuals as party defendants. They are merely identified as doing business in the name of the Seattle-Portland-San Francisco Auto Stage Company. The company as a separate entity, is not made a party defendant. To have included this last-mentioned company as a party defendant independent of the individuals who are alleged to compose the organization, it should have been specifically named as a defendant. This was not done. Our courts have uniformly held, without exception, that similar descriptions of individuals as members of an association or partnership, does not constitute the organization itself a party to the action. This is not an action pursuant to the provisions of section 388 of the Code of Civil Procedure against the ‘common name’ under which individuals are associated and doing business.”

In the case of *Maclay Company v. Meads*, 14 Cal. App. 363, where suit was filed in unlawful detainer against a series of defendants "acting and assuming to act under the name and style of Petaluma Transportation Company" by reason of a breach of a lease agreement entered into between plaintiff and the Petaluma Transportation Company, the Court, in holding that the partnership entity and the individuals were distinct and separate, used the following illuminating language in its decision, at page 372:

"But where, as here, the action is against the members of the partnership in their individual character, and not against the partnership by its partnership name, the effect of service of process or summons on one member, or on all the members, is not to summon the partnership but only the member or members upon whom such service is had, *and, in such case, in order to bind all the members of the firm by any judgment which may be obtained in the action, service of summons must be made on all.* Of course, where the action is against the partnership, then, by the terms of section 388, *supra*, service of summons on one or more of the members of the partnership is sufficient, and thereby the judgment in the action is binding not only upon 'the joint property of all the associates,' but also upon 'the individual property of the party or parties served with process.' We entertain no doubt that, tested by the provisions of section 388 of the Code of Civil Procedure and the decisions to which we have directed attention, the complaint here falls far short of disclosing that plaintiff, however much it

may have intended to do so, proceeded against the Petaluma Transportation Company. As in *Davidson v. Knox*, 67 Cal. 143, (7 Pac. 413), and *Feder v. Epstein*, 69 Cal. 456, (10 Pac. 785), so it is true here, that the defendants, though constituting, according to the averments of the complaint, the partnership named the Petaluma Transportation Company, 'were not sued by their common name, but by their individual names,' and *the action was, therefore, against each member of said partnership, in his personal and not in his partnership character.*"

Likewise, the Court in the case of *Potts v. Whitson*, 52 Cal. App. (2d) 199 at page 206, stated:

"Language almost identical in form, and entirely so in principles of expression, to that used in the body of the complaint in the case before us. 'That at all times herein mentioned, R. D. Whitson and Herman Lewis were and are co-partners doing business under the trade name and style of Whitson-Lewis Theatres,' has been consistently held to be *descriptio personae*. . . . In *John Bollman Co. v. S. Bachman & Co.*, *supra*, (1911) 16 Cal. App. 589, 590 (117 Pac. 690, 122 Pac. 835), it appears that in a complaint against and a demurrer by 'Simon Bachman and Arthur Bachman, co-partners doing business under the firm name of S. Bachman & Company' the quoted language was held to designate the partners as individuals and not the firm as an entity. Thus we find that the partnership which plaintiff now claims filed the answer was not sued by its common name; that its name does not appear in the

title of the complaint as a party; that the allegations in the body of the complaint serve only to identify and describe the individual defendants and that the cause of action is specifically stated against the individuals. . . . In the light of the foregoing discussion it is apparent that the entity Whitson-Lewis Theaters was not made a party to the action and that the answer filed by the defendants R. D. Whitson and Herman Lewis constitutes an answer on their behalf as individuals and not an answer on behalf of a stranger to the action which would have no standing therein (*Artana v. San Jose Scavenger Co.*, (1919) *supra*, 181 Cal. 627, 629)."

The evidence is uncontradicted that neither appellant Marty Sherman nor Jim Jung nor Marvin Berry ever personally made any sales of potatoes during April or May of 1943. [Rep. Tr. pp. 77, 78.]

Furthermore neither of appellants had anyone working for them as individuals to buy or sell any potatoes, but at all times it was the employees of the Victory Produce Company who sold potatoes in the course and scope of the partnership business. [Rep. Tr. pp. 77, 78 and 104.]

It is therefore evident that plaintiff failed to sue and to have before the Court the proper party defendant, against which alone plaintiff could have hoped to establish liability, to wit, Victory Produce Company, a copartnership. Consequently, the judgment entered against the individual Appellants was erroneous.

II.

The Trial Court Erred in Determining That It Was Obligatory Upon the "Intermediate Seller" to Inquire Into the Propriety of the Contract Carrier's Freight Rate Included by the "Country Shipper" in the Price of the Potatoes Purchased by the "Intermediate Seller" Upon a "Delivered" Basis.

1. The Country Shipper and Intermediate Seller Under MPR 271.

Maximum Price Regulation 271, as it existed during the period set forth in plaintiff's complaint, was specifically divided into certain sections which were appropriately and particularly headed:

Sec. 1351.1002—How a *country shipper* establishes his maximum price . . .

Sec. 1351.1003—How an *intermediate seller* calculates his maximum price . . .

Sec. 1351.1004—Information which each country shipper and intermediate seller must pass on to his purchaser.

Accordingly, if a country shipper wishes to compute his maximum price, he looks to Section 1351.1002. If an intermediate seller wishes to compute his maximum price, he looks to Section 1351.1003. When the country shipper sells to the intermediate seller, he must "supply in writing to his purchaser on his invoice, sales ticket, cash receipt, or other written evidence of the sale," the information contained in Section 1351.1004. The intermediate seller must do the same when he sells to his purchaser.

Furthermore, Section 1351.1004 specifically provides that *“the invoice, sales ticket, cash receipt or other written evidence of the sale when containing the above required information shall be deemed to be proper notification to the purchaser.”*

A reasonable construction of the aforesaid sections of Maximum Price Regulation 271 would seem to require that each seller in determining his maximum price is governed by a particular section relating to him, and that each purchaser is given the right to rely upon the correctness of the information supplied to him in writing by his seller. For it must be kept in mind at all times that the parties are dealing in perishable food commodities that must be marketed from farmers to consumers in order to prevent spoilage. Therefore, when the Victory Produce Company received delivery of the potatoes at its customary receiving point, to wit, its docks in Los Angeles, from the country shipper in the Bakersfield area, and was presented with the country shipper's price on a written invoice containing the information required by Section 1351.1004, which included a contract carrier's freight charge of thirty cents per hundred pounds, the Victory Produce Company was entitled to rely upon the correctness of the country shipper's computations and the validity of the freight charge made, without further inquiry on its part, because the *“written evidence of the sale, when containing the above required information shall be deemed to be proper notification to the purchaser.”* In other words, the Victory Produce Company had the right to base the computation of its selling price upon the price which it paid to the country shipper as set forth in his invoice, without bearing the responsibility of determining whether the country shipper had correctly ascertained and included

the proper freight charge in the price at which he was selling.

Peculiarly enough, this very problem was presented in another case involving the Office of Price Administration against the Appellant Jim Jung in the District Court, Southern District, Central Division, No. 3475-Civil, before the Honorable Judge Leon Yankwich, wherein said Jung was charged with violating Maximum Price Regulation 292, as amended (8 Fed. Reg. 135), in connection with the purchase and sale of tangerines. Judge Yankwich's penetrating opinion was rendered on November 21, 1944, and appears in Volume 2, page 2232 of Pike and Fisher's Desk Book—Opinions and Decisions.

In the tangerine case, Sections 1351.1405 (c) and (d) were involved. In said sections as in the instant case, the "base price" of the intermediate seller was defined to be the base price *furnished* to him or *reported* to him by his supplier. In that case, as here, counsel for the Office of Price Administration contended that defendant Jim Jung, who had purchased tangerines from a commission merchant and from an intermediate seller could not take as his base price the price he had paid to the commission merchant and intermediate seller, unless the commission merchant or intermediate seller had correctly computed the price at which he was selling according to the regulation.

Of this contention, Judge Yankwich said,

"Nor can I follow the Administrator in his contention that before the defendant could pay the price asked by Ko, it was imperative that Ko shall have computed correctly the base price at which he was selling. The regulation, and especially the clauses of the section referred to, (see (c) and (d)), do not

place such responsibility upon an intermediate seller. They permit him to ground his price upon the price *furnished or reported* to him by the seller. *They do not make it his duty to ascertain* whether the seller had computed the price correctly, under penalty of having his resale price challenged. It may well be, as counsel for the Administrator stated, that 'base price' in this regulation are words of art and must be interpreted in the light of the aim to be achieved by the regulation. But this does not require us to place a responsibility upon one vicariously where the regulation does not impose it.

It is also true that, in an action of this character, inquiry might be made to see if a purchase was a mere subterfuge to avoid the regulation. Here the evidence is uncontroverted that the purchase from Ko was made at the price shown on the face of the drafts."

Furthermore, a consignment of tangerines involved in the above case had been packed originally in Imperial Valley and had then been transported by their packer, first, to Los Angeles, and then to San Francisco. They were then shipped from San Francisco to Los Angeles. The Office of Price Administration contended that the only freight charge that could be properly added was the charge from Imperial Valley to Los Angeles. Judge Yankwich held otherwise and stated, "Under the circumstances, I think that the *actual freight paid* should be considered in making the computation in order to determine what the overcharges were on the sales from this consignment."

Appellants further submit that the Office of Price Administration itself is responsible for the aforesaid con-

struction of MPR 271. In that connection, Appellants refer the Court to Example (a) contained in the footnote to Section 1351.1018 of MPR 271, as issued November 7, 1942. In illustrating how a terminal market wholesaler (an intermediate seller) sets his maximum prices, the explanatory footnote states: "Looking at his cost *as set forth by the country shipper's invoice*, he finds the 'net cost' for these potatoes to be \$1.90 per cwt. . . . To this 'net cost' . . . *he adds the actual freight of \$179 . . . etc.*" Thus, the intermediate seller is led to believe that he may rely upon the country shipper's invoice, to which the actual freight paid may properly be added in computing his maximum price. In the instant case, Victory Produce Company purchased the potatoes from the country shipper on a "delivered" basis, that is, delivery was made by the country shipper to the intermediate seller's customary receiving point, to wit, its docks at the wholesale market in Los Angeles, California. The evidence is uncontroverted that the purchase by the Victory Produce Company from the country shipper was made at the price shown on the face of the invoices which included the freight charge actually paid by the country shipper.

A logical and reasonable construction therefore of the appropriate sections of Maximum Price Regulation 271 leads to the inevitable conclusion that the intermediate seller may rely upon the information contained in the written evidence of the sale supplied to him to the country shipper, and it is not the duty of the intermediate seller to investigate whether the country shipper correctly computed his price with respect to the transportation charges made and paid by the country shipper.

2. MPR 271 and GMPR.

It is the contention of Appellee that the Victory Produce Company was obligated to inquire into and to determine that the freight charge of the contract carrier paid by the country shipper actually complied with the General Maximum Price Regulation. With this contention Appellants take issue. Sections 1499.2 and 1499.3 of the General Maximum Price Regulation provided for freezing of prices of commodities and services generally as of March, 1942. However, Paragraph 1499.21 of the General Maximum Price Regulation provided as follows:

“1499.21 *Effect of other price regulations.* 1499.13, 1499.14, 1499.15 and 1499.25 of this General Maximum Price Regulation shall apply but the other provisions of this General Maximum Price Regulation shall not apply to any sale or delivery for which a maximum price is in effect, at the time of such sale or delivery, under the provisions of any other price regulation issued, by the Office of Price Administration, unless otherwise provided in any such price regulation. (Paragraph 1499.21 as amended by Am. 7, 7 F. R. 4659, effective 6-25-42.)”

The plain intent of the above language is to take out of the General Maximum Price Regulation any commodity for which prices are established in subsequent schedules of prices established by the Administrator of the Office of Price Administration. Early white potatoes are governed by MPR 271, first issued in November of 1942 and subsequently amended and revised on numerous occasions. Therefore, anything pertaining to the definition or ascertainment of ceiling price on early white potatoes must be sought in MPR 271 and not in the General Maximum Price Regulation.

The only exception would be in those instances in which Maximum Price Regulation 271 or Revised Maximum Price Regulation 271 specifically referred to the General Maximum Price Regulation as indicated by that part of the above quoted language of Section 1499.21 of GMPR, "unless otherwise provided in any such price regulation."

In none of the amendments to MPR 271 from November, 1942 to June 30, 1943, was anything said in the regulation as to the measure of transportation charges that the country shipper might pay to contract carriers. Finally, however, on June 30, 1943, Amendment 3 of the Revised Maximum Price Regulation 271 was issued, reading as follows:

"4. Section 8 (a) (17) is amended to read as follows:

(17) 'Cost of transportation' means: (i) If shipment is by a common carrier. . . .

(ii) If shipment is by a carrier for hire other than a common carrier (such as a contract carrier) the amount actually paid to the carrier *but not in excess of the maximum charges as determined by the General Maximum Price Regulation, amendments, and supplementary regulations thereto*, or such other regulations of the Office of Price Administration as may be applicable to the services of such carrier at the time of movement. The amount of the transportation tax imposed by Section 620 of the Revenue Act of 1942 may be added."

Thus, not until June 30, 1943, at a period subsequent to the transactions alleged in plaintiff's complaint, did MPR 271 expressly state that the contract carrier's rates

paid by the country shipper or intermediate seller shall not exceed the maximum price as determined by General Maximum Price Regulation.

Appellee seeks to invoke the aforesaid rule retroactively by implication. Appellants submit that such an implication is barred by the language of GMPR 1499.21, which expressly stated that except for the paragraphs enumerated therein and which are not germane to the principal case, the GMPR should not be read in or become a part of subsequent regulations unless otherwise provided in any such subsequent price regulation. MPR 271, with its amendments and revisions, is such a subsequent regulation and any determination of price schedules of early white potatoes must be ascertained from the four corners of MPR 271. Thus, the stand taken by Appellee in its attempt to penalize Appellants for trucking charges actually paid by the country shipper to transport the potatoes to Victory Produce Company is insupportable under the price regulations pursuant to which the Office of Price Administration has instituted its action.

3. MPR 271 and Its Amendments.

The very history of MPR 271 from November 7, 1942 to June 30, 1943, supports Appellants' contentions that the Victory Produce Company properly calculated its maximum price in accordance with MPR 271.

The evidence is uncontroverted that the early white potatoes delivered by the country shipper to the Victory Produce Company were not shipped by common carrier from the Bakersfield railway station to the Los Angeles railway station, but were shipped by contract carrier, by truck, from the country shipper's source in the Bakersfield area to the docks of the Victory Produce Company in Los

Angeles, its customary receiving point. Almost all of the potato shipments had been received by Victory Produce Company in that manner.

MPR 271 did not forbid transportation by contract carrier, nor did it purport to regulate the price to be paid by the country shipper to the contract carrier for the transportation of said potatoes. The only regulations relating to transportation set forth in MPR 271 was one that related to "available common carrier." The Office of Price Administration finally began to realize that the regulation had failed to take into consideration the practical fact that country shippers might utilize contract carriers instead of common carriers. Therefore, it was not until March 18, 1943, in Amendment 5 to MPR 271 that the word "contract carriers" was even mentioned in Section 1351.1014 (a) (2). Thereafter on May 25, 1943, Revised Maximum Price Regulation 271 was issued, becoming effective as to all intermediate sellers on May 31, 1943. It is interesting to note that RMPR 271 made the following significant removals from the MPR 271 in force and effect during the period set forth in plaintiff's complaint. From MPR 271 effective during the period from April 1, 1943 to May 27, 1943, the following sections were removed: 1351.1002 (c), 1351.1003 (4) and 1351.1004. In place of the first two of the aforesaid sections which were removed, amendments were inserted so that when the sections spoke of "cost of transportation", there was added "(the lowest common or contract carrier rates for available transportation)." Thus, for the first time the Office of Price Administration recognized and attempted to secure some sort of control over the cost of transportation by contract carrier. Nevertheless, RMPR 271 remained silent as to the measure of transportation charges that the coun-

try shipper might pay to such contract carriers and it was not until June 30, 1943, in Amendment 3 to RMPR 271 hereinbefore set forth that a definite regulation was made that the "amount actually paid to the contract carrier" shall be "not in excess of the maximum charges as determined by the General Maximum Price Regulation, amendments and supplementary regulations thereto."

It is therefore apparent from a history of MPR 271, the amendments thereto and of the Revised Maximum Price Regulation 271 culminating in Amendment 3 thereof, that the measure of transportation charges which the country shipper might pay to the contract carrier was not made subject to control.

Appellants submit that they should not be penalized for acts committed by the Victory Produce Company in compliance with the regulation because of the failure and confusion on the part of the Office of Price Administration itself to enact the proper regulations to bring the subject matter of contract carrier rates paid for by the country shipper within the scope and control of MPR 271.

4. The OPA and the Country Shipper.

Appellants had consistently maintained before and during the trial of the above action that the Office of Price Administration should proceed, if at all, against the country shipper who had included the contract carrier freight rate of thirty cents per hundred pounds in his invoice to the Victory Produce Company. After judgment had been obtained herein, the Office of Price Administration went

to trial on or about the 12th day of February, 1945, in the District Court, Southern District, Northern Division, in action No. 217, against the country shipper, Marvin Berry. In that case the Office of Price Administration claimed, as in the instant case, that Marvin Berry should have charged eighteen cents per hundred pounds of potatoes for the transportation charge by truck of the potatoes shipped by Marvin Berry to the Victory Produce Company, instead of the thirty cents per hundred pounds paid and charged by him. This Court may take judicial notice of the fact that on this aspect of the case, plaintiff was defeated in its claim and failed to recover a judgment against the defendant country shipper. Thus, we have an anomalous situation wherein the Victory Produce Company, the intermediate seller, having paid the thirty cents per hundred pounds transportation charge, included in the country shipper's price, was penalized for an act committed by the country shipper, which act of the country shipper was held not to be in violation of MPR 271 in the OPA's suit against the country shipper. Certainly, if the country shipper was found to have complied with MPR 271, the intermediate seller cannot be found to have violated MPR 271. It cannot be contended that what it was legal for the country shipper to charge, it was illegal for the intermediate seller to pay. Under the circumstances, therefore, a reversal of the judgment against the Appellants would seem imperative.

III.

The Evidence Was Insufficient to Support the Judgment Against Appellants Jim Jung and Marty Sherman.

A. The Evidence Failed to Show That the Victory Produce Company as the "Intermediate Seller" Sold in Excess of Its Ceiling Price Within the Meaning of the Provisions of Maximum Price Regulation 271, as Amended.

The Office of Price Administration had the burden of proof to establish by clear and convincing evidence that Victory Produce Company sold early white potatoes in excess of its ceiling price within the meaning of the provisions of Maximum Price Regulation 271. Appellants submit that plaintiff failed to sustain this burden.

1. First, if we assume for the purpose of argument that the Victory Produce Company was obliged to inquire into the transportation charge paid for by the country shipper and included by it in its price charged to the Victory Produce Company, then appellants contend that there is no evidence in the record showing the "lowest available common carrier rate" existing at the time of the transactions here in question. Although the figure of twenty-two cents per hundred pounds is freely discussed by counsel for the respective parties as being the prevailing common carrier rate, nowhere is there any evidence introduced to establish that any common carriers were *available* to transport the potatoes at the time of the transaction in question. In fact, the only testimony on the part of plaintiff's witness, George M. Meyers, a freight clerk for the Southern Pacific in the freight office in Los Angeles, was to

the effect that he had no knowledge as to whether or not there were any freight cars available during the two months in question, to wit, during April and May, 1943. [Rep. Tr. p. 16.]

Since Section 1351.1002 provided that the country shipper, in establishing his maximum price, would add "the transportation charges he has actually paid, at lowest available common carrier rates from his country shipping point to the place where the commodities are to be delivered", it was incumbent upon plaintiff to prove that a common carrier, to make the common carrier rates applicable, was *available* for shipment of the potatoes in question. Unless and until plaintiff met that requirement by introducing evidence to that effect, it wholly and completely failed to establish that the price of the country shipper paid by Victory Produce Company, including the transportation charge, was in excess of its ceiling as provided.

2. Second, plaintiff failed to show that it was improper for Victory Produce Company to pay the transportation rate of thirty cents per hundred pounds charged by the contract carrier to the country shipper. Its introduction of evidence that truckers in the Bakersfield area in March, 1942, were charging eighteen cents per hundred pounds for similar transportation failed to sustain plaintiff's burden of proof because of the inapplicability of the General Maximum Price Regulation to this situation as hereinbefore set forth under Subdivisions 2 and 3 of Point II hereof.

B. Plaintiff Failed to Introduce Any Evidence to Show What the Country Shipper's Lowest Available Common Carrier Rate Was With Respect to the Potatoes Shipped by the Country Shipper to the Customary Receiving Point of Victory Produce Company During April and May of 1943.

The evidence is uncontradicted that shipment of the potatoes here in question was made by the country shipper from the Bakersfield area to the docks of the Victory Produce Company in Los Angeles, California. The evidence is further uncontradicted that the docks of the Victory Produce Company were its customary receiving point of the potatoes during April and May of 1943. This Court can take judicial notice of the fact that the Southern Pacific Company shipped from its terminal in the Bakersfield area to its terminal, the Union Station, in Los Angeles. Plaintiff must admit that the railroad terminal in Los Angeles of Southern Pacific Company was not the customary receiving point of the Victory Produce Company, and, consequently, any evidence introduced by it to show the lowest available common carrier rate was inapplicable and irrelevant to the situation and insufficient to support its contentions in this case.

It is a known fact that, because the common carrier does not make a habit of transporting food such as potatoes from the door of the country shipper to the door of the wholesale marketer, the contract carrier has become a vital and necessary means of transporting potatoes from the source of the country shipper to the place of business of the intermediate seller. This means of transportation

was not adopted by either the country shipper or the intermediate seller for the purpose of evading the OPA regulations, but because it is a faster, more efficient and, all in all, even a cheaper method of transportation of perishable food commodities. The Victory Produce Company, therefore, cannot be condemned for utilizing a means of transportation which is used by practically everyone in the same situation in the industry.

C. The Evidence Failed to Show That the Appellants Jim Jung and Marty Sherman Made Any Sales of Potatoes or That They Were Personally Liable For Any Violations of the Provisions of the Maximum Price Regulation 271, as Amended.

The argument in support of the above contention is fully set forth in Point I of this Argument, which is adopted as though incorporated herein at this point. The evidence is uncontradicted that neither of the Appellants Jim Jung or Marty Sherman, individually or personally sold or bought any potatoes nor had anyone working for them individually who sold any potatoes. [Rep. Tr. p. 104.]

IV.

The Court Committed Errors in the Admissions of and in the Refusal to Strike Out Certain Evidence.

A. The Evidence of the Common Carrier Freight Rates in April and May, 1943, Charged for the Shipping of Potatoes From the Bakersfield Area to Los Angeles, California, Should Not Have Been Admitted for the Reason That It Was Completely Immaterial to the Issues of the Case. [Rep. Tr. p. 14.]

1. Appellants have previously pointed out that the intermediate seller under the terms of MPR 271 would be justified in paying to the country shipper the price shown upon the country shipper's invoice, and was under no obligation to inquire into the correctness of the computations of the country shipper's price, which included the transportation charge of the contract carrier.

2. Practically all of the potato shipments were made from the country shipper's source to the customary receiving point of the intermediate seller, to wit, the docks of Victory Produce Company, located at 1124 South San Julian Street, Los Angeles, California. Unless plaintiff could show that the common carrier charged for and performed the same service of transportation from the country shipper's source to the docks of Victory Produce Company, any evidence as to the common carrier rates for April and May, 1943, was absolutely immaterial.

3. Furthermore, said evidence did not directly relate to whether or not the freight rate was the "lowest available common carrier rate" for said period. For the foregoing reasons, appellants submit that the aforesaid evidence to it, should have been rejected by the trial court.

B. Evidence of the Price Charged by Edison Trucking Company or Any Other Contract Carrier for the Haul of Potatoes From the Bakersfield area to Los Angeles in March, 1942, Was Inadmissible for the Reason That It Was Immaterial, Irrelevant and Hearsay. [Rep. Tr. p. 18 and 19, 25 and 26.]

The Court will note that the only evidence in the record as to any hauls of potatoes being made in March, 1942, from the Bakersfield area to Los Angeles, California, was the testimony of Jack Schnitzer, who testified that "it just happened to be I hauled about twenty sacks the last day of March" for which he had charged eighteen cents per hundred pounds for the haul. All of this evidence was objected to by counsel for appellants upon the ground that it was immaterial as to what discussion took place concerning the ceiling price for trucking and this evidence was admitted under the guise of a discussion at a meeting of the assembled truckers. Certainly, there can be no doubt that this evidence was hearsay and, therefore, inadmissible upon that ground alone.

In addition, it shows how the purported eighteen cent ceiling price was set by the OPA. By their own testimony, merely because one trucker, Jack Schnitzer, had on the last day of March, 1942, hauled twenty sacks of potatoes at a price of eighteen cents per hundred pounds, in the eyes of the OPA that price automatically became the ceiling price for the entire group of truckers in the Bakersfield area.

Appellants have already elaborated upon their contention that GMPR had no applicability to the situation here in question and, by reason thereof, all of the aforesaid evidence is immaterial and irrelevant to the issues.

- C. All the Evidence Introduced by Plaintiff Showing the Methods by Which the "County Shipper" Determines His Maximum Ceiling Prices Under the Provisions of MPR 271, as Amended, Was Inadmissible for the Reason That It Was Immaterial, Irrelevant, and No Proper Foundation Was Laid Therefor. [Rep. Tr. p. 17.]**

Appellants repeat their contention that the only evidence relevant to the issues is that which related to how the intermediate seller computes his maximum prices. Any evidence relating to how the country shipper computes his maximum prices is entirely foreign to the issues presented in this case.

- D. All Evidence of Sales of Potatoes During April and May, 1943, Made by Victory Produce Company, Which Was Not a Party to the Action, Was Incompetent, Irrelevant, and Immaterial for the Reason That the Only Parties Before the Court Were the Individuals Jim Jung and Marty Sherman. [Rep. Tr. p. 18, 19, 21, 52, 67, 75, 82-94.]**

Appellants adopt the contentions heretofore made under Point I of this brief and incorporate them herein by reference.

Conclusion.

Appellants submit that a grave injustice has been committed by the imposition of judgment against them in the above matter.

1. First, Appellants submit that they complied with the letter and spirit of the regulation issued by the Office of Price Administration. Potatoes were sold to the Victory Produce Company and duly invoiced including the transportation charge. The Victory Produce Company paid the price charged by the country shipper and then took its

appropriate mark-up and sold in turn to its purchaser. The only fly in the ointment was the failure of the Produce Company to inquire into whether or not the country shipper had correctly computed and charged the transportation rate for hauling the potatoes. It is this discrepancy which provides the flimsy basis for the case brought by the Office of Price Administration.

The country shipper in a jury trial in Bakersfield has been held to have been justified in making the transportation charge to Victory Produce Company which Victory Produce Company paid. Now the Victory Produce Company is placed in the position of being mulcted in damages for paying that which the country shipper has been held justified in charging.

There is no question that it is the function of the Office of Price Administration to check and prevent inflation arising out of illegal and unjustifiable price increases. But in this case, the basis of its suit against Appellants is unfounded, its construction of its own regulations artificial, and the prosecution of its action unjustified.

2. Aside from the merits of the controversy, the judgment against Appellants cannot stand since the only entity against which a judgment might have been sought was the Victory Produce Company, which was not a party to the action.

Appellants therefore respectfully submit that judgment heretofore entered in favor of plaintiff and against Appellants be reversed.

Respectfully submitted,

EDWARD M. RASKIN,

Attorney for Appellants.

No. 11,035

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JIM JUNG and MARTY SHERMAN,

Appellants,

VS.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellee.

BRIEF FOR APPELLEE.

GEORGE MONCHARSH,

Deputy Administrator for Enforcement,

HERBERT H. BENT,

Regional Litigation Attorney,

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No. 11,035

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JIM JUNG and MARTY SHERMAN,

Appellants,

VS.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

This is an appeal by the defendants from a judgment entered on December 14, 1944 (R. 10), by the United States District Court for the Southern District of California, Central Division, in favor of the Price Administrator pursuant to Section 205(e) of the Emergency Price Control Act of 1942—56 Stat. 23, 50 U. S. Code App. Section 925(e)—hereinafter referred to as the Act, as amended by Section 108(b) of the Stabilization Extension Act of 1944 (58 Stat. 840). Notice of Appeal was filed March 9, 1945 (R. 10). Jurisdiction of the District Court was invoked under Sections 205(c) and 205(e) of the Act. Jurisdiction

to hear and determine the appeal is conferred upon this Court by Section 128 of the Judicial Code (28 U. S. Code 225).

STATUTES AND REGULATIONS INVOLVED.

The action involves two regulations issued by the Administrator pursuant to Section 2(a) of the Act, namely, the General Maximum Price Regulation, issued April 28, 1942 (7 F. R. 3153), which became effective on May 11, 1942, and Maximum Price Regulation 271, issued November 7, 1942, establishing maximum prices for potatoes and onions (7 F. R. 9179) which became effective on November 9, 1942.

STATEMENT OF FACTS.

This is an action by the Price Administrator against "Jim Jung, Marty Sherman and Marvin Berry, individually and doing business as Victory Produce Company" (R. 2), to recover statutory damages by reason of overcharges made by the defendants on sales of potatoes at wholesale between April 12, 1943, and May 27, 1943. Throughout the period of the transactions in question the defendants Jim Jung, Marty Sherman, and Marvin Berry were co-partners, doing business as Victory Produce Company, with the principal place of business located in Los Angeles, California (Amended Compl., par. 4, R. 3; admitted in the Answer, R. 5). All three defendants appeared by Mr. Lerner, their attorney, and filed answer to the complaint (R. 5),

although only Jim Jung and Marty Sherman were served with process. Mr. Lerner later withdrew his appearance for the defendant Marvin Berry and plaintiff stipulated that Mr. Lerner was not representing Berry as an individual (R. 20, 21).

The potatoes which the Victory Produce Company sold at prices in excess of the maximum price permitted under Maximum Price Regulation 271 were purchased by said partnership from Marvin Berry, one of the partners (R. 17, 20, 40, 43-44; App. Br., p. 25), and were delivered to the partnership at its place of business in Los Angeles from Berry's warehouse in Bakersfield (R. 20). Berry charged his partners a freight rate of 30 cents per hundredweight for delivering the potatoes by contract carrier (R. 20). This freight was paid by the defendants directly to the trucking company "as a matter of bookkeeping convenience" (Mr. Lerner's statement, R. 43-44). Under the General Maximum Price Regulation the legal rate for the haul in question, i.e., the base rate prevailing in March, 1942, was 18 cents per hundredweight (R. 24). In computing their own costs for purposes of mark-up, the defendants added to their net cost the illegal freight rate of 30 cents per hundredweight (12 cents above the legal rate permitted under the General Maximum Price Regulation) and passed the same on to the consumer. They contend on this appeal that they were entitled to do so.

The Court found that the defendants violated Maximum Price Regulation 271 by charging prices totaling \$8965.78 in excess of the legal prices permitted under

said Regulation (R. 8) and that the overcharges were made in good faith and all practicable precautions were taken against making such overcharges (R. 6, 8). Judgment was entered in favor of the plaintiff and against the two defendants served, Jim Jung and Marty Sherman, in the sum of \$5977.18. No judgment was granted against the partner not served.

ARGUMENT.

I. THE PROCEDURAL CONTENTIONS OF THE APPELLANTS ARE UTTERLY WITHOUT MERIT.

The principal contention of the appellant is purely procedural. Insofar as it can be understood at all, its amazing "logic" runs as follows: In California a partnership is a legal entity; the California Code of Civil Procedure, Section 388, permits partnerships to be sued "in their common name" in the same manner as corporations by alleging the legal entity and naming it as the defendant; plaintiff did not name the partnership as a separate defendant and it is therefore not a party to the action; none of the partners (defendants below) personally sold the potatoes in question, but that all such sales were made by employees of the partnership; *therefore* only the partnership as such is liable for the overcharges, and *not* the individual partners!

A. The substantive law of partnerships in California is not affected by Section 388 of the California Code of Civil Procedure.

Appellants' entire argument is based upon a gross misconstruction of Section 388 of the California Code of Civil Procedure. Appellants assume that the said section effects a change in the substantive law governing partnerships by declaring California partnerships to be legal entities. This section, however, authorizing actions to be brought against partnerships "in their common name", merely provides a convenient method of suing partnerships and associations by naming them as defendants and dispensing with the necessity of naming or serving individual partners. The California Supreme Court, in passing upon the constitutionality of Section 388, stated:

"These statutes (similar to Section 388) dealt solely with the manner of bringing actions, and were not intended to effect any change in the substantive law. Members of associations had the same rights and were subject to the same liabilities as before, only now they could be sued by a less complicated and cumbersome process * * * Since it (Section 388) establishes no substantive liability, and merely provides a convenient method of suit to enforce an existing liability * * *"

Jardine v. Superior Court, 213 Cal. 301, 2 P. (2d) 756 (1931).

In *Reed v. Industrial Commission*, 10 Cal. (2d) 191, 73 P. (2d) 1212, 1213 (1937), the Court, in discussing the legal entity theory, stated:

"The underlying fallacy in respondent's argument is the assumption that the partnership is a

distinct unit, separate from the members thereof. Occasional suggestions of this 'entity' theory of partnership are found in statutes or decisions, but, apart from exceptional situations, a partnership is not considered an entity, but an association of individuals. See *First Nat. Trust & Savings Bank v. Industrial Accident Commission*, 213 Cal. 322, 331, 2 P. 2d 347, 78 A.L.R. 1324; 9 Cal. L. Rev. 119. In consonance with this view, an employee of a partnership is an employee of each of the partners, and no individual partner may escape liability to such employee on the ground that only the partnership and not the individuals composing it can be held. It is immaterial whether the liability of the partners in this situation is joint and several, or joint, for even in the case of joint liability, a several judgment may be had against an individual partner by proper joinder, and pleading. See *Palle v. Industrial Commission*, 79 Utah 47, 7 P. 2d 284, 81 A.L.R. 1222; *Merchants' Nat. Bank v. Clark-Palmer Co.*, 215 Cal. 296, 9 P. 2d 826, 81 A.L.R. 778."

Therefore, appellants' assumption that the individual partners, as such, are not liable for the partnership obligations is not sustained by the "legal entity" theory.

- B. In an action upon a joint or partnership obligation in which the partnership as such is not named nor all of the partners served with summons, the action may nevertheless proceed against those who are served.**

As has been shown above, Section 388 does not purport, nor has it ever been construed, to abolish the

right to sue partners without designating the common name as a separate defendant.

Jardine v. Superior Court, supra.

When the common name is not used and all the partners are not served, the action may proceed and judgment may be had against those partners served.

Davidson v. Knox, 67 Cal. 143, 7 Pac. 413;

Feder v. Epstein, 69 Cal. 456, 10 Pac. 785;

Iwanaga et al. v. Hogopian et al., 179 Pac. 523,
39 Cal. App. 584.

This procedure is specifically authorized in California by Sections 414, 578 and 989 of the Code of Civil Procedure, which apply to actions on all joint or partnership obligations.

Merchants' Nat. Bank of Los Angeles v. Clark-Parker Co., 215 Cal. 296, 9 P. (2d) 826;

Reed v. Industrial Accident Commission, supra.

The appellants cite a number of California decisions holding that a partnership does not become a party to an action merely because its members are designated as co-partners. Conceding, *arguendo*, that this is not an action against the partnership within the meaning of these decisions and that *the partnership property will not be bound by the judgment against the individual partners because all were not served*, it is impossible to see the materiality of these decisions to the instant case. In none of these decisions was it held that partners *must* be sued in their common name or that, when all partners are named but only some served, the suit may not proceed to judgment against

those served. On the contrary, *in each case cited the judgment against the partners served was upheld.*

- C. In any event, the California rule of pleading invoked by the appellants is superseded by the Federal Rules of Civil Procedure. Appellants' claim was waived by their failure to plead or move with respect thereto.

As demonstrated under Point I, the legal entity theory in California is not one of substantive law. On the contrary, even under the California law it has clearly been held to be only a rule of pleading.¹

However, as to all matters of pleading, the Federal Rules of Civil Procedure "govern" this action (Rule 1), and "all laws in conflict therewith shall be of no further force or effect" (28 U. S. Code 723(b)). It is elementary that, under the Federal Rules of Civil Procedure, an action cannot be defeated because of technical defects in the pleading.

Sparks v. England, 113 F. (2d) 579, 581 (8th Cir., 1940);

Hanney v. Franklin Fire Insurance Co. of Philadelphia, 142 F. (2d) 864 (9th Cir., 1944).

With regard to the specific defect complained of by the appellants, Rule 9(a) of the Federal Rules of Civil Procedure provides that "it is not necessary to

¹*Jardine v. Superior Court*, *supra*; *Reed v. Industrial Commission*, *supra*; *Burns v. Downs*, 42 Cal. App. (2d) 322, 108 P. (2d) 953. The California courts do not recognize the legal entity theory where the suit is brought by the partnership as plaintiff, and in such a case the action must be brought in the names of the individual partners. *Ginsburg Tile v. Faraone*, 99 Cal. App. 381, 278 Pac. 866 (1929); 126 Cal. App. 337, 14 Pac. (2d) 777 (1932).

aver * * * the legal existence of an organized association of persons that is made a party''. Hence the California doctrine, insofar as it purports to require allegations of the legal existence of the partnership in the complaint, is plainly "of no force and effect" in actions in the Federal Courts.

Furthermore, under Rule 12(b) the defense of lack of jurisdiction over the person must be made by answer or by motion before pleading, and under Rule 12(h) the defense is waived if not so presented. In the instant case the claim of lack of jurisdiction over the partnership was for the first time urged at the trial, as a ground for dismissal of the action. Hence

" * * the point, whether considered as a question of capacity under Rule 9(a) or of lack of jurisdiction over the person under Rule 12(b), was waived under Rule 12(h) by not being advanced before trial."*

Trounstine v. Bauer, Pogue & Co., 144 F. (2d) 379, 383 (2d Cir., 1944), certiorari denied, 65 S. Ct. 190.

II. THE CAUSE OF ACTION WAS ESTABLISHED BY COMPETENT AND UNCONTROVERTED EVIDENCE. THE APPELLANTS' CONTENTIONS ON THE MERITS ARE NOT BASED ON THE RECORD, AND FOR THE MOST PART WERE NEVER URGED BELOW.

A. The uncontroverted evidence established that the defendants paid on behalf of their seller, who was their own partner, illegally excessive freight charges, and passed them on to their customers.

The record presents no controverted questions of fact. The defendants purchased potatoes from their

partner Berry, to be delivered from his warehouse in Bakersfield to their place of business in Los Angeles. "Almost all of the potato shipments" were made "by contract carrier, by truck" (App. Br., pp. 22-23). Berry was charged a freight rate of 30 cents per hundredweight (stipulation at the trial, R. 20). This charge was actually paid by the defendants direct to the trucking company, as a separate item. The procedure was described in the Court below by the defendants' attorney himself (R. 43-44):

"Mr. Lerner. I think maybe we ought to enter into the stipulation this way; I offer this stipulation: I think it is generally recognized that the sales were made on a delivered basis; that the freight was being purportedly paid for by Mr. Berry, but as a matter of bookkeeping convenience, at the request of Mr. Berry we would pay the freight directly to the Edison Trucking Company, and deduct the same from the price billed to us by Marvin Berry or other potato companies from whom we purchased. I say 'we'; I mean from whom the Victory Produce Company purchased."

The seller who charged this freight and who sold all the potatoes in question was Mr. Marvin Berry, one of the partners. Although "other potato companies from whom we purchased" are mentioned in the quoted statement, the appellants have since conceded on this appeal that Marvin Berry was the only person who acted as the seller (App. Br., at p. 25). There is other evidence in the transcript pointing to the same fact (R. 17, 20, 40).

The authorized legal rate for this freight was that charged for the same service in March, 1942 (General Maximum Price Regulation, Sec. 1499.2). It was established by competent testimony and stipulated by the appellants that this was 18 cents per hundred-weight (R. 24).

The bulk of the potatoes were sold by the defendants at prices which included and passed on to their customers the excessive transportation charge, plus a mark-up (of 21% or 91½%, depending on whether the goods were delivered at the customers' or defendants' place of business). A complete summary of the defendants' sales on credit² showing computation of ceiling, overcharge and selling price for each hundred-weight, was prepared by the plaintiff's investigators who had audited the defendants' records. This summary was received in evidence as Plaintiff's Exhibits 1 and 2, and its factual and mathematical correctness was stipulated by defendants' counsel (R. 53-54, 60-61, 66-67).³

²The proof was limited to sales made on credit. As to all cash sales, the defendants, according to their attorney, "were unable to locate the record of cash sales" (R. 41).

³The defendants made many overcharges in excess of the freight differential, and indeed charged prices without any reference to the regulations. The stipulated itemized record (Plaintiff's Exh. 2, pp. 20-48) shows a multitude of overcharges substantially in excess of 12 cents plus mark-up. No attempt to justify these overcharges was made below or in the appellants' opening brief.

- B. Nothing appears in the record to support the appellants' contention that in computing their selling prices they relied on their seller's invoices; nor was this contention ever urged below.**

The principal contention of the appellants on the merits is that the regulations permitted them to rely on their seller's invoices in computing their costs for the purposes of fixing their own selling prices (App. Br., pp. 3, 15-25, 26, 30, 32, 33). The essence of the argument is that "the Victory Produce Company had the right to base the computation of its selling price upon the price which it paid to the country shipper as set forth in his invoice, without bearing the responsibility of determining whether the country shipper had correctly ascertained and included the proper freight charge in the price at which he was selling" (App. Br., pp. 16-17).

This contention is cynical in its disregard of the facts and the record. Not a single invoice was offered in evidence, nor a word of testimony introduced to show any reliance thereon. *The seller was the defendants' partner, and the freight was paid by the defendants as a separate item, directly to the carrier* (R. 43-44; pp. 9, 10, *supra*). Moreover, since the appellants themselves paid the freight direct to the shipper, it cannot be determined from the record whether the invoice given the partnership by Berry even included the freight rate charged.

It is significant that the appellants did not have the temerity to urge this claim upon the trial Court. It is made for the first time on this appeal.

It will be noted that appellants' contention is not predicated on any facts and is entirely moot. Therefore, its legal validity (which appellee emphatically rejects) is not a proper subject for argument.

C. The remaining contentions of the appellants are without substance.

1. It is hardly necessary to argue the further contention that defendants had the right to pay and pass on to their customers illegal freight charges because sales of potatoes were governed by the specific Maximum Price Regulation 271 and not by the General Maximum Price Regulation which established maximum prices for freight charges. It should be noted that like the claim that the defendants were misled by their seller's invoices, this contention with regard to the inapplicability of the General Maximum Price Regulation was not made below.

In any event, the prohibition against paying illegal prices for commodities and services is contained not only in the Maximum Price Regulation but in the Act itself (Sec. 4a). The "cost" of a commodity to a seller cannot possibly mean the cost augmented by illegal freight charges. The authorization to pay seller's "actual freight" (M.P.R. 271 as quoted in App. Br., p. 19) cannot conceivably have reference to black-market freight. To carry the appellants' argument to its logical conclusion, any purchasers in the black market would be permitted to pass on their illegal costs to the public.

If a specific prohibition against such a practice is required, it is supplied by Maximum Price Regulation 271, governing the sales of potatoes, which at all times contained the following Section:

“§ 1351.1008. Evasion. The price limitations which are set forth in this Maximum Price Regulation 271 shall not be evaded whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of or relating to any of the commodities listed in any Appendix hereof, alone or in conjunction with any other commodity or by way of commission, service, *transportation* or any other charge or account, discount, premium, or other privilege, or by tying-agreement or other trade understanding or otherwise.” (Emphasis added.)

2. The arguments that the plaintiff was obliged to prove the availability of transportation by common carrier (App. Br., pp. 26-27) and that the Court erred in admitting evidence as to the common carrier rates (*id.*, p. 30), are simply irrelevant. The gravamen of the action is not that the defendants failed to use common carriers, but that they passed on to their customers illegal freight charges of contract carriers. Practically all of the shipments were made by contract and not by common carrier (*id.*, pp. 22-23; R. 30).

3. On this appeal the attempt is made to influence the Court by reference to matter *dehors* the record, relating to subsequent litigation between the Price Administrator and the missing partner, Marvin Berry (App. Br., pp. 25, 33). It is submitted that this matter

has no place in the brief, and that appellee cannot rebut it without becoming guilty of the same improper practice.

III. SINCE THIS APPEAL RAISES NO SUBSTANTIAL QUESTION FOR CONSIDERATION BY THE COURT AND IS WHOLLY LACKING IN MERIT, IT SHOULD BE DISMISSED AS FRIVOLOUS AND DAMAGES SHOULD BE AWARDED TO THE APPELLEE PURSUANT TO SECTION 878, TITLE 28, U. S. CODE AND RULE 26 OF THIS COURT.

A. The procedural contentions of the appellants are without any support of authority and are obviously frivolous.

Examination of the record and the appellants' opening brief discloses that the procedural contentions of the appellants formed the principal defense below and one of the major grounds of appeal. It has been shown above that these contentions are not based on the decisions cited by the appellants or on any other authority. The sole point established by these decisions is that where not all the partners are served, the partnership property will not be bound unless the partnership name or entity was added as a party. Obviously this principle, whatever its validity, has no relation to the judgment appealed from, which is against two individual partners. As has been shown under point I, *supra*, California statutory and common law specifically authorizes actions against partners without the use of the partnership name; and where, as in this case, all partners are named but not all are served, individual judgments may be obtained against the partners on the partnership liability. This was held

in the two leading California cases, *Davidson v. Knox* and *Feder v. Epstein*, which are cited by the appellants themselves (App. Br., p. 13).

Incredible as it may seem, in every case cited by appellants in support of their procedural contention, the Court sustained the precise procedure followed in the case at bar, and approved judgments against those partners who were served, though the partnership in each case was not named as a defendant.

B. The appellants' contentions on the merits are equally frivolous.

The chief contention of the appellants on the merits is that in computing their maximum selling price they had the right to rely on invoices from their seller which included an item of freight in the price to the appellants. We have seen under point II that this contention is belied by the record. There is not one iota of evidence to show any *actual* reliance on any invoice. The record does show, however, that the defendant "seller" was *their own partner* and that the freight was paid *by them* as a separate item *direct* to the trucking company. Furthermore, the contention was never urged below and therefore cannot be urged as a ground of reversal. It thus appears that the appellants' contentions on the merits are at least as frivolous as their procedural argument.

CONCLUSION.

It clearly appears that this appeal raises no substantial question for consideration by the Court and is wholly lacking in merit. The conclusion is irresistible that the appeal has been sued out merely for delay. Under such circumstances an appeal may be dismissed as frivolous and damages awarded pursuant to statute (28 U. S. Code 878) :

Robertson v. Wilkinson, 10 F. (2d) 311 (C.C.A. 5th, 1926) ;

Dakin v. U. S., 105 F. (2d) 150 (C.C.A. 4th, 1939).

It is respectfully submitted that the judgment of the lower Court should be affirmed, or that the appeal herein should be dismissed as frivolous and damages for delay awarded to the appellee pursuant to Rule 26 of this Court.

Dated, September 21, 1945.

Respectfully submitted,

GEORGE MONCHARSH,

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(Appendix Follows.)

Appendix

APPLICABLE PROVISIONS OF THE EMERGENCY PRICE CONTROL ACT OF 1942 AS AMENDED BY SECTION 108(b) OF THE STABILIZATION EXTENSION ACT OF 1944.

Sec. 2. (a) Whenever in the judgment of the Price Administrator (provided for in Section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. * * *

Sec. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under Section 2, or of any price schedule effective in accordance with the provisions of Section 206, or of any regulation, order, or requirement under Section 202(b) or Section 205(f), or to offer, solicit, attempt, or agree to do any of the foregoing.

Sec. 205. (e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption

other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year

period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

APPLICABLE PROVISIONS OF THE GENERAL MAXIMUM PRICE REGULATION. (ISSUED APRIL 28, 1942; 7 F. R. 3153, EFFECTIVE MAY 11, 1942.)

Maximum Prices.

§ 1. (§ 1499.1) Prohibition against dealing in commodities or services above maximum prices. On and after the effective date of this Regulation, regardless of any contract or other obligation:

(a) No *person* shall *sell* or deliver any *commodity*, and no person shall sell or supply any *service*, at a price higher than the maximum price permitted by this Regulation; and

(b) No person in the course of trade or business shall buy or receive any commodity or service at a price higher than the maximum price permitted by this Regulation.

* * * * *

§ 2. (§ 1492.2) Maximum prices for commodities and services: general provisions. Except as otherwise provided in this Regulation, the *seller's* maximum price for any commodity or service shall be:

(a) The highest price charged by the seller during March, 1942:

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it; or

(b) If the seller's maximum price cannot be determined under paragraph (a), the highest price charged during March, 1942, by the most closely competitive seller of the same class:

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it.

**APPLICABLE PROVISIONS OF MAXIMUM PRICE
REGULATION 271.**

§ 1351.1001. Applicability of this Maximum Price Regulation No. 271. (a) Commodities to be priced under this regulation. This regulation applies to the following perishable food commodities:

(1) All white flesh potatoes, whether used for human consumption or as seed potatoes.

(2) All dry onions used for human consumption, produced in the calendar year 1942.

(b) To what types of sellers this regulation applies. This regulation applies to country shippers and all intermediate sellers, as defined herein, of the commodities listed in paragraph (a) of this section, but does not apply to retailers.

(c) Purposes of this regulation. (1) Appendix A sets forth maximum prices and repeats the applicable differentials set forth in § 1351.1002(b) for the country shipper, at the country shipping point, on board car or any other common carrier, for each variety and grade, in the month of sale and area in which the commodities were produced.

(2) Appendix B sets forth the figures which different classes of intermediate sellers must use in calculating maximum prices.

(d) Prohibition against sales above maximum prices. On and after November 9, 1942, regardless of any contract or other obligation, no person is permitted to sell or deliver perishable food commodities at prices higher than the maximum prices established by this regulation, and no person is permitted to buy or receive perishable food commodities in the course of trade or business at prices higher than the maximum prices herein established. Lower prices may be charged and paid.

§ 1351.1003. How an intermediate seller calculates his maximum prices for perishable food commodities listed in Appendix B. * * *

(b) The intermediate seller shall calculate once every week on the day set forth opposite the name of

the food commodity in Appendix B his maximum price for each variety and grade of such food commodity as follows:

(1) The intermediate seller shall first find from paragraph (a) of this section in what class of intermediate seller he falls.

* * * * *

(4) The intermediate seller shall then determine his "net cost" of his "largest single purchase" as defined above, of the food commodity being priced. "Net cost" means the amount he paid for the food commodity delivered at his customary receiving point less all discounts allowed him except the discount for prompt payment; however, no charge or cost for local unloading or local trucking shall be included.

(5) The intermediate seller shall then multiply his "net cost" as defined above, by the figure in Appendix B which applies to the class in which the intermediate seller falls. The resulting figure is the maximum price which the intermediate seller is permitted to charge for the 7-day period from the day set forth opposite the name of the food commodity set forth in Appendix B, provided that if an intermediate seller purchases food commodities from another intermediate seller, he shall resell such food commodities directly to a retailer, and shall not resell to another intermediate seller.

§ 1351.1008. Evasion. The price limitations which are set forth in this Maximum Price Regulation No. 271 shall not be evaded whether by direct or indirect methods, in connection with any offer, solicitation,

agreement, sale, delivery, purchase or receipt of or relating to any of the commodities listed in any Appendix hereof, alone or in conjunction with any other commodity or by way of commission, service, transportation or any other charge or account, discount, premium, or other privilege, or by tying-agreement or other trade understanding or otherwise.

**APPLICABLE PROVISIONS OF THE CALIFORNIA CODE OF
CIVIL PROCEDURE.**

§ 388. (Associates may be sued by name of association.) When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability. (Enacted 1872; Am. Stats. 1901, p. 127 (unconstitutional); Stats. 1907, p. 704.)

§ 414. Proceedings where there are several defendants and part only are served. When the action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants. (Enacted 1872.)

§ 578. Judgment may be for or against one of the parties. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves. (Enacted 1872.)

§ 989. (Summoning unserved joint debtor to show cause why he should not be bound by judgment.) When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding as provided in Section 414 of this code, those who were not originally served with the summons, and did not appear in the action, may be summoned to appear before the court in which such judgment is entered to show cause why they should not be bound by the judgment, in the same manner as though they had been originally served with the summons. (Enacted 1872; Am. Stats. 1933, p. 1896; Stats. 1935, p. 1965.)

No. 11035.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JIM JUNG AND MARTY SHERMAN,

Appellants,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellee.

APPELLANTS REPLY BRIEF.

EDWARD M. RASKIN,
1204 Loew's State Building, Los Angeles 14.
Attorney for Appellants.

FILED

OCT 5 - 1945

PAUL P. O'BRIEN,
CLERK

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No. 11035.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JIM JUNG AND MARTY SHERMAN,

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vs.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellee.

APPELLANTS REPLY BRIEF.

Appellants have never believed it necessary in the taking of an appeal to characterize its contentions in the order of their importance or significance. However, in view of the fact that Appellee has seen fit to single out Appellants' procedural contention as the "principal contention of the Appellants," it is advisable to deal with this matter so that there is no possible misunderstanding, either in the minds of the members of this Honorable Court, or in the minds of counsel for Appellee.

Appellants have raised three contentions:

- (1) Substantive (Point II of Appellants' Opening Brief).
- (2) Evidentiary (Point III of Appellants' Opening Brief).
- (3) Procedural (Point I of Appellants' Opening Brief).

If, at any time, this Honorable Court thought it necessary to inquire into Appellants' estimate of the relative degree of importance of their contentions on appeal, Appellants would submit said contentions in the order quoted above. Accordingly, Appellants will deal with the issues raised in the above order.

I.

The Trial Court Erred in Determining That It Was Obligatory Upon the "Intermediate Seller" to Inquire Into the Property of the Contract Carrier's Freight Rate Included by the "Country Shipper" in the Price of the Potatoes Purchased by the "Intermediate Seller" Upon a "Delivered" Basis.

It is gratifying to Appellants to note that Appellee has failed to meet and to reply to the arguments made and authorities cited in Subdivisions 1, 2, 3 and 4 of Point II of Appellants' Opening Brief. Appellee's only contentions in this regard have been that "Nothing appears in the record to support Appellants' contention that in computing their ceiling prices they relied on their sellers invoices nor was this contention ever urged below."

Let us look at the record.

The main source of disagreement between Appellants and Appellee from the outset of this controversy was the question as to the freight charge involved herein and the consequent mark-up thereon taken by Appellants. The case was tried below from beginning to end upon that basis. Appellee contended that Appellants could only take a mark-up on the basis of a freight charge of either eighteen cents, if delivered by contract carrier, or twenty-

two cents, if delivered by common carrier, whereas it was Appellants' contention that if they paid the freight charge of thirty cents as demanded by the country shipper, they could pass this charge on to their consumer in turn with the appropriate mark-up. Appellants refer this Honorable Court specifically to pages 57, 60 and 81 of the Transcript of Record on Appeal.

Appellants have constantly labelled the contract carrier's freight charge for the hauling of potatoes herein as "black market freight." The record clearly shows that during the months of April and May in the vicinity of Bakersfield, the charge of *all* contract carriers for hauling potatoes from Bakersfield to Los Angeles was thirty cents per hundred pounds. Not one contract carrier, but *every* contract carrier in the district was making the same charge, so that if any potatoes were to be shipped by contract carrier from Bakersfield to Los Angeles, Appellants either had to pay the thirty cents freight charge which the country shipper paid, or the potatoes would never have been delivered. Appellee evidently attempts to create the impression that Victory Produce Company singled out a contract carrier to pay a thirty cent freight charge to in order to evade the appropriate O. P. A. regulations. However, both of the witnesses who testified for plaintiff, Ruben Kundert and Jack Schnitzer, stated that during the months of April and May, 1943, every contract carrier in the area charged thirty cents per hundredweight for the hauling of potatoes and it was not until some time in May, at the insistence of the O. P. A. that all of the contract carriers went back to the eighteen cents per hundredweight charge. [See pp. 25-33 of Record.]

Thus, the entire controversy in question between Appellants and Appellee arose during a period when the contract carriers believed they had the right to charge thirty cents per hundred pounds to the country shipper, and the country shipper thought he had the right to pass on this charge of thirty cents to the intermediate seller, and Victory Produce Company, as intermediate seller, thought it had the right to include the freight charge of thirty cents in its computation of its selling price. If the Victory Produce Company had paid a charge of thirty cents per hundredweight, when the contract carrier had in fact only made a charge of eighteen cents per hundredweight, then Appellee's assertion as to "black market freight" would be understandable. But this was never the case and the Court specifically found that Victory Produce Company at all times acted in good faith and all practical precautions were taken against making overcharges. [R. 8.]

It is undisputed from the plaintiff's own case that their witness, Ruben Kundert, hauled the potatoes in question *for Marvin Berry* in April and May of 1943 from the Bakersfield area to the Victory Produce Company in Los Angeles and *charged to Marvin Berry* the sum of thirty cents for the haul. [R. 17 and 20.]

Nevertheless, Appellee asserts that because the invoices from the country shipper to Victory Produce Company were not introduced into evidence, therefore, there is no evidence in the record that Appellants relied upon said invoices showing the thirty cent freight charge involved. A brief glance at the record will dispose of this assertion.

All of the records of Victory Produce Company were in Court, including the invoices in question, and they would undoubtedly have been presented into evidence by either Appellee or Appellants were it not for the fact that the trial of the case was considerably shortened by reason of the many stipulations entered into between counsel at the trial. Throughout the record constant reference is made to "purchase invoice" or "purchase records" or "purchase tickets" from Marvin Berry. *The purchase invoices of Victory Produce Company of the potatoes in question and the country shippers sales invoices of said potatoes are one and the same thing* and the constant discussion both by the witnesses and counsel concerning these purchase records showing the freight charges involved make clear to any reasonable person that these were the invoices relied upon by Victory Produce Company in making the sales of the potatoes in question.

Appellants refer this Honorable Court to pages 36, 37, 39, 40 and 43 of the Transcript.

Moreover, defendant Marty Sherman, who testified as a witness for plaintiff under Section 2055 of the Code of Civil Procedure and for defendants on defense, testified that the selling price of Victory was based upon "the cost of the potatoes *delivered* to Los Angeles"—"on the purchase price *delivered to Los Angeles*" [R. 80], and further that "the Victory Produce Company purchased these potatoes from the country shipper on a *delivered* basis, at whatever the price was at the time of delivery." [R. 104.]

Thus, there is no question that the contract carrier charged Marvin Berry, the country shipper, thirty cents per hundredweight for hauling the potatoes from Bakersfield to the docks of the Victory Produce Company; that Marvin Berry passed this charge of thirty cents per hundred pounds on to Victory Produce Company; that Victory Produce Company paid this charge of thirty cents per hundred pounds for the hauling of the potatoes; and that Victory Produce Company in turn passed this thirty cent freight charge on to its purchaser in calculating the appropriate O. P. A. ceiling price. What other inference or deduction could there possibly be from the evidence in the record than that Victory Produce Company relied upon the charge to it by the country shipper of the potatoes, including the freight charge of thirty cents per hundredweight.

Appellee attempts to befog the issue by pointing out that Marvin Berry, the seller of the potatoes to Victory Produce Company, was also a partner in the Victory Produce Company. Apart from the fact that this comment has no legal materiality or relevancy, Appellants wish to refer this Honorable Court to the following portion of the record appearing on page 77.

“By Miss Marten: How long did the partnership of yourself, Jim Jung and Marvin Berry, which you formed on April 5, 1943, continue in existence? A. Roughly about two weeks, but the dissolution was not completed until some 75 days after we got together, I believe.”

Furthermore, Appellee attempts to create a false issue by stating that the freight charge was paid by the Victory Produce Company directly to the carrier, and bases this assertion upon a purported statement made at the trial by Mr. Lerner, counsel for Appellants, appearing on pages 43-44 of the Transcript. First, it should be pointed out that the quotation appearing on page 10 of Appellee's brief was immediately followed by the statement of Miss Marten of counsel for Appellee, "We don't stipulate to that, Your Honor." [R. 44.] However, Appellants are willing to abide by the statement made by Mr. Lerner, and quoted in Appellee's brief, provided counsel for Appellee accept the entire statement as made, including the statement that the freight was paid by Victory Produce Company directly to the Edison Trucking Company as a matter of bookkeeping convenience at the request of Mr. Berry, and that said freight charge would thereafter be deducted from the price billed to Victory Produce Company by Marvin Berry.

All of the aforesaid contentions of Appellants were raised at the time of trial in the argument of the case, which argument has not been reported, and in the trial briefs submitted by the parties. Nevertheless, even in the absence thereof, so long as the issues have been raised by the evidence presented at the trial of the case, Appellants have the right to raise any questions of substantive law resulting therefrom for consideration by this Honorable Court.

II.

The Evidence Was Insufficient to Support the Judgment Against Appellants.

Appellee has likewise seen fit in answering Subdivision A of Point III of Appellants' Opening Brief to place its reliance chiefly upon its assertion that the contentions made therein were not made below, which contention has already been dealt with.

Appellants have contended that plaintiff failed to prove that the freight charge of eighteen cents per hundred pounds for the hauling of potatoes established the appropriate ceiling which Appellants could pay therefor because of the inapplicability of the General Maximum Price Regulation to the situation involved. The only answer of the O. P. A. is the statement that "the cost of a commodity to the seller cannot possibly mean the cost augmented by illegal freight charges." This answer assumes a position, not by analyzing the issues involved, but by merely branding a label thereon. No further reply thereto is therefore necessary.

With reference to Subdivision B of Point III of Appellants' Opening Brief, Appellee asserts that evidence as to the common carrier rates were simply irrelevant. That was Appellants' position at the time of the trial, but trial counsel for the O. P. A. evidently thought otherwise, in view of the fact that it presented a witness, George M. Meyers, whose testimony was solely confined to this particular issue. [R. 14-16.]

III.

The Judgment Was Improper Because the Partnership Known as Victory Produce Company Was Not a Party to This Action.

The procedural issue involved in this case is sharply drawn and further discussion thereof would be superfluous. In any event, Appellants would prefer that the issues involved in the instant case be decided upon their merits rather than upon a procedural technicality.

Wherefore, Appellants pray that this Honorable Court reverse the judgment heretofore entered in favor of plaintiff and against defendants.

Respectfully submitted,

EDWARD M. RASKIN,

Attorney for Appellants.

No. 11048

United States
Circuit Court of Appeals
For the Ninth Circuit.

E. H. CLARKE LUMBER COMPANY,
an Oregon corporation,
Appellant,

vs.

P. N. KURTH,
Appellee.

and

P. N. KURTH,
Appellant,

vs.

E. H. CLARKE LUMBER COMPANY,
an Oregon corporation,
Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States
for the District of Oregon

No. 11048

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E. H. CLARKE LUMBER COMPANY,
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Upon Appeals from the District Court of the United States
for the District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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for Appellant.

CARL D. ETLING, BRUCE CAMERON,

Lumbermen's Bldg., Portland, Ore.

for Appellee.

In the District Court of the United States
For the District of Oregon

No. Civ. 2373

P. N. KURTH,

Plaintiff,

vs.

E. H. CLARKE LUMBER COMPANY,

an Oregon corporation,

Defendant.

AMENDED COMPLAINT

Comes now the plaintiff and for cause of action against the defendant complains and alleges:

I.

That plaintiff brings this action under and by virtue of an act of Congress of the United States for the regulation of commerce among the states, to-wit, the Fair Labor Standards Act of 1938 (29 U.S.C.A., paragraphs 201-219, inclusive), as hereinafter more fully appears.

II.

That since about November 12, 1940, the defendant has been, and now is, a corporation, duly organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business located in the City of Sweet Home, Oregon; that during all times pertinent hereto the defendant owned, maintained and operated, as it now does, a certain sawmill for the

manufacture of sawlogs into lumber, which said sawmill has been, and now is, located in the City of Sweet Home, Oregon. That said lumber manufactured in its said sawmill is sold and shipped by means of railroad, etc., to various concerns located outside the State of Oregon, and substantially all of said lumber manufactured by said defendant was, and now is, shipped to states other than the State of Oregon, and said defendant during all of the times herein mentioned was, and now [1*] is, engaged in commerce and the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938, and was and now is subject to all the terms and provisions thereof.

III.

That subsequent to October, 1940, for a period of about six months, plaintiff was employed by said defendant as a fireman and engineer in said sawmill upon the basis of an eight hour day and a forty hour week, with time and one-half for overtime; that plaintiff during this period was actually compelled by defendant, because of the nature of his employment, to work 9 hours per day, as well as other hours, including work on Sundays, and he was actually paid by the defendant for these extra hours regular time for forty hours per week, and time and one-half for overtime.

IV.

That after this period of employment plaintiff

*Page numbering appearing at foot of page of original certified Transcript of Record.

quit working for defendant, and was absent from his employment with defendant for about three months, until about July 1941, when he was solicited for re-employment by the defendant under the same arrangements and terms as before states: and the plaintiff was again employed by defendant under the same arrangements and terms as before stated from about July, 1941, to and including about September 1, 1942; that from about July, 1941, to and including about February 14, 1942, plaintiff was employed by defendant upon the hourly rate of \$.65 per hour, and from about February 15, 1942, to and including about April 11, 1942, plaintiff was employed by defendant upon the hourly rate of \$.70 per hour, and from about April 13, 1942, to and including about July 11, 194, plaintiff was employed by defendant upon the hourly rate of \$.75 per hour, and from about July 12, 1942, to and and said September 1, 1942, plaintiff was required employed by defendant upon the [2] hourly rate of \$.80 per hour; and that between said July, 1941, including about September 1, 1942, plaintiff was by defendant in his said employment to work a total of 465 hours in excess of forty hours per week, for which he has only received 263 hours pay, leaving a balance of 202 hours pay in excess of forty hours per week due and owing for which he should have received pay at the rate of time and one-half, as appears more particularly in the itemized statement attached hereto, which said statement is referred to as Exhibit A, and by this reference made a part of this complaint as though set forth herein

verbatim; that plaintiff has received no extra wages whatsoever for said 202 hours worked in excess of said forty hours per week, but was compelled by said defendant, to work said forty hours per week plus said excess hours aforesaid; that plaintiff often demanded additional wages for said additional hours worked, in accordance with the terms and provisions of said Fair Labor Standards Act of 1938, and defendant promised that it would be made right later, but said defendant has wholly failed, neglected and refused to pay said additional sums, notwithstanding the terms and provisions of said act, and thereupon plaintiff quit said employment by reason thereof; and that by reason thereof, plaintiff is entitled to have and receive of defendant as wages, in accordance with the provisions of said act aforesaid for said excess hours worked the sum of Two Hundred Thirteen and 69/100 (\$213.69) Dollars, in which amount defendant is indebted to plaintiff by reason of the facts aforesaid.

V.

That in addition to said unpaid wages of \$213.69, as hereinbefore set forth, plaintiff is entitled to receive of and from defendant, under and by virtue of the provisions of said act [3] aforesaid, an additional amount equal to one and one-half times the plaintiff's regular rate of pay for all work performed in excess of 40 hours per week for the period mentioned; that is to say, plaintiff is entitled to receive of and from defendant as liquidated damages under and by virtue of the provisions of said

act an additional sum of Two Hundred Thirteen and 69/100 (\$213.69) Dollars.

VI.

That plaintiff has been compelled to employ an attorney to persecute his claim for wages and liquidated damages, and plaintiff is therefore additionally entitled to have and receive of and from defendant a reasonable amount as attorney's fees; that a reasonable amount to be allowed plaintiff as attorney's fees herein is the sum of Two Hundred Fifty and no/100 Dollars, (\$250.00).

Wherefore, plaintiff prays for judgment against the defendant for the full sum of Two Hundred Thirteen and 69/100 (\$213.69) Dollars; for the further sum of Two Hundred Thirteen and 69/100 (\$213.69) Dollars, liquidated damages; for the further sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, attorney's fees; and for plaintiff's costs and disbursements incurred herein.

CARL D. ETLING

CARL D. ETLING &

BRUCE CAMERON

Attorneys for Plaintiff [4]

State of Oregon,

County of Multnomah—ss.

I, P. N. Kurth being first duly sworn, say that I am the plaintiff in the within entitled action and that the foregoing complaint is true as I verily believe.

P. N. KURTH

Subscribed and sworn to before me this 22nd day of April, 1944.

[Seal]

C. D. ETLING

Notary Public for Oregon

My commission Expires March 19, 1947.

Due and legal service of the foregoing Amended Complaint by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon on this 24th day of April, 1944.

R. N. KAVANAUGH—m

Attorney for Defendant

[Endorsed]: Filed April 24, 1944. [5]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now the defendant herein and for answer and defense to plaintiff's amended complaint admits:

I.

The allegations contained in paragraphs I and II of said amended complaint.

II.

Defendant further admits that plaintiff was employed by the defendant in its sawmill in the City of Sweet Home, Oregon, during the period from about July, 1941 to September, 1942 and in connection therewith was engaged in commerce and the

act an additional sum of Two Hundred Thirteen and 69/100 (\$213.69) Dollars.

VI.

That plaintiff has been compelled to employ an attorney to persecute his claim for wages and liquidated damages, and plaintiff is therefore additionally entitled to have and receive of and from defendant a reasonable amount as attorney's fees; that a reasonable amount to be allowed plaintiff as attorney's fees herein is the sum of Two Hundred Fifty and no/100 Dollars, (\$250.00).

Wherefore, plaintiff prays for judgment against the defendant for the full sum of Two Hundred Thirteen and 69/100 (\$213.69) Dollars; for the further sum of Two Hundred Thirteen and 69/100 (\$213.69) Dollars, liquidated damages; for the further sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, attorney's fees; and for plaintiff's costs and disbursements incurred herein.

CARL D. ETLING

CARL D. ETLING &

BRUCE CAMERON

Attorneys for Plaintiff [4]

State of Oregon,

County of Multnomah—ss.

I, P. N. Kurth being first duly sworn, say that I am the plaintiff in the within entitled action and that the foregoing complaint is true as I verily believe.

P. N. KURTH

Subscribed and sworn to before me this 22nd day of April, 1944.

[Seal]

C. D. ETLING

Notary Public for Oregon

My commission Expires March 19, 1947.

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R. N. KAVANAUGH—m

Attorney for Defendant

[Endorsed]: Filed April 24, 1944. [5]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now the defendant herein and for answer and defense to plaintiff's amended complaint admits:

I.

The allegations contained in paragraphs I and II of said amended complaint.

II.

Defendant further admits that plaintiff was employed by the defendant in its sawmill in the City of Sweet Home, Oregon, during the period from about July, 1941 to September, 1942 and in connection therewith was engaged in commerce and the

production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938.

III.

Except as hereinafter expressly alleged the defendant makes no answer and waives defenses to all of the other material allegations, matters and things set forth in plaintiff's amended complaint.

For A Separate Affirmative Answer And Defense To Plaintiff's Amended Complaint, the defendant alleges:

I.

That this is a suit by Plaintiff for recovery of overtime or premium pay allegedly accrued for work performed within the State of Oregon, including penalty thereunder, required and [13] authorized by a statute for work performed more than six months prior to the institution of this action.

II.

That Chapter 265 of Oregon Laws 1943 provides as follows:

Section 1. Recovery for overtime or premium pay accrued or accruing, including penalties thereunder, required or authorized by any statute shall be limited to such pay or penalties for work performed within six months immediately preceding the institution of any action or suit in any court for the recovery thereof; provided, that an action may be maintained within a period of 90 days after the effective date of this act on claims heretofore accrued.

Section 2. Any law in conflict herewith to that extent is repealed hereby.

Section 3. It hereby is adjudged and declared that existing conditions are such that this act is necessary for the immediate preservation of the public peace, health and safety; and an emergency hereby is declared to exist, and this act shall take effect and be in full force and effect from and after its passage.

That said law is now and has been for more than ninety days prior to the institution of this action, in full force and effect.

III.

That this action was not commenced within the time limited by law, as provided in said Chapter 265 of Oregon Laws 1943 and, therefore, it may not be maintained.

Wherefore, defendant demands judgment that plaintiff take nothing by reason of his amended complaint, that this action be dismissed and that defendant have judgment against plaintiff for its costs and disbursements incurred herein.

R. N. KAVANAUGH

R. R. MORRIS

DAVID L. DAVIES [14]

State of Oregon

County of Multnomah—ss.

Due service of the within Answer to Amended Complaint is hereby accepted at Portland, Oregon, this 8th day of May, 1944 by receiving a copy

thereof, duly certified to as such by Hugh L. Biggs of attorneys for Defendant.

C. D. ETLING

Attorney for Plaintiff

[Endorsed]: Filed May 8, 1944. [15]

[Title of District Court and Cause.]

MOTION TO DISMISS ANSWER

The Plaintiff moves the Court as follows:

1. To strike certain portions of defendant's answer and defense to plaintiff's amended complaint, because they are indefinite, vague, redundant, sham, frivolous, and argumentative, (a) the whole of paragraph III, lines 23, 24, and 25, page 1, as follows, "Except as hereinafter expressly alleged the defendant makes no answer and waives defenses to all of the other material allegations, matters and things set forth in plaintiff's amended complaint"; (b) that portion set forth in paragraph III, line 24, page 1, as follows, "material." *Clarinda Trust & Savings Bank v. Doty*, 83 Or. 214, 163 P. 418, *Ready v. Schmitt*, 52 Or. 196, 95 P. 817, 1 Enc. of Pl. and Pr. 782, *Phillips on Code Pleading*, 2d ed. sec. 331.

2. To dismiss defendant's Separate Affirmative Answer and Defense to Plaintiff's Amended Complaint because it fails to state a defense to said complaint in that (a) Chapter 265 Oregon Laws 1943 has no application to the plaintiff in this ac-

tion brought under the Fair Labor Standards Act of 1938, 29 U.S.C.A. sections 201-219 inclusive. *Campbell v. Haverhill*, 15 S. Ct. 217, *Order of Rd. Telegraphers v. Railway Express Agency*, Feb. 28, 1944, U. S. . . . , and other cases and authorities; (b) as construed and applied by the [16] defendant, said Chapter 265 Oregon Laws 1943 violates Article 1, Section 8, of the United States Constitution in that it interferes with the power of Congress to regulate commerce among the several states in a field already occupied by Congress. *Concordia Fire Ins. Co. v. Illinois*, 292 U. S. 535, 545, *Port Richmond & C. Co. v. Board of Chosen Freeholders*, 234 U. S. 317, *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, and other cases and authorities; (c) as construed and applied by the defendant, said Chapter 265 Oregon Laws 1943 violates the Fourteenth Amendment of the United States Constitution in that it deprives plaintiff of his property without due process of law; and that it denies plaintiff the equal protection of the laws. *Hager v. Reclamation Dist.*, 111 U. S. 701, 708, and other cases and authorities; (d) on its face, Chapter 265 Oregon Laws 1943 violates Article 1, Section 8, of the United States Constitution in that it interferes with the power of Congress to regulate commerce among the several states in a field already occupied by Congress. *Port Richmond & C. Co. v. Board of Chosen Freeholders*, *Western Union Tel. Co. v. Kansas*, both cited under *supra*, (b) and other cases and authorities, (e) on its face, Chapter 265 Oregon Laws 1943 violates the Fourteenth Amendment

of the United States Constitution in that it deprives plaintiff of his property without due process of law; and that it denies plaintiff the equal protection of the laws. *Hager v. Reclamation Dist.*, cited under *supra* (c), and other cases and authorities.

It is hereby certified that in my opinion the foregoing motion is well founded in law; and is not interposed for purposes of delay.

/s/ CARL D. ETLING

Off Attorneys for Plaintiff

[17]

Due and legal service of the foregoing motion is hereby accepted this 13th day of May, 1944, by receipt of a certified copy thereof.

/s/ DAVID L. DAVIES

Of Attorneys for Defendant

[Endorsed]: Filed May 13, 1944. [18]

[Title of District Court and Cause.]

PRETRIAL ORDER

This cause came on regularly for pretrial before the Honorable James Alger Fee on May 15, 1944. Plaintiff was represented by Messrs. Carl D. Etling and Bruce Cameron, his attorneys, and defendant was represented by Messrs. Hugh L. Biggs and Richard R. Morris, of its attorneys.

Based upon the proceedings had at said pretrial hearing, it is

Ordered that the following matters are admitted:

I.

That plaintiff brings this action under and by virtue of an act of Congress of the United States for the regulation of commerce among the states, to wit, the Fair Labor Standards Act of 1938 (29 U.S.C.A., Section 201-219, inclusive).

II.

That since about November 12, 1940, the defendant has been, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business located in the City of Sweet Home, Oregon; that during all times pertinent hereto the defendant owned, maintained and operated, as it now does, a certain sawmill for the manufacture of sawlogs into lumber, which said sawmill has been, and now is, located in the City of Sweet Home, Oregon. That said lumber manufactured by defendant in its said sawmill is sold and shipped by means of railroad, etc., to various concerns located outside the State of Oregon, and a substantial portion of said lumber manufactured by said defendant [19] was, and now is, shipped to states other than the State of Oregon, and said defendant during all of the times herein mentioned was, and now is, engaged in commerce and the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938, and was and now is subject to all the terms and provisions thereof.

III.

That plaintiff was employed by the defendant in its sawmill in the City of Sweet Home, Oregon, during the period from about July, 1941, to September, 1942, and in connection therewith was engaged in commerce and the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938.

IV.

That on or about July 11, 1942, while still in the employ of defendant, plaintiff filed a complaint with the U. S. Department of Labor, Wage and Hour Division, against the defendant regarding the wages alleged due and unpaid in his complaint, and that said Wage and Hour Division, pursuant to said complaint, made an investigation of defendant, and upon completion and termination of this investigation, plaintiff's records were returned to him by said Wage and Hour Division on or about October 14, 1943.

V.

That frequent demands were made by and on behalf of plaintiff during the time he worked for defendant, and after he left defendant's employ and during the period aforementioned for said wages, and that thereafter, through his attorney, Mr. Bruce Cameron, plaintiff made demands upon the defendant for said wages alleged due and unpaid in his complaint, and the defendant discussed these demands with said attorney for plaintiff in said attorney's office in the Lumbermen's Building, Portland, Oregon, on or about November, 1943. [20]

VI.

That this is an action by plaintiff for recovery of overtime pay allegedly accrued for work performed within the State of Oregon; that all services rendered by plaintiff to defendant were prior to September 2, 1942; that this action was instituted by plaintiff against the defendant on the 10th day of February, 1944.

VII.

That Chapter 265 of Oregon Laws 1943 provides as follows:

Section 1. Recovery for overtime or premium pay accrued or accruing, including penalties thereunder, required or authorized by any statute shall be limited to such pay or penalties for work performed within six months immediately preceding the institution of any action or suit in any court for the recovery thereof; provided, that an action may be maintained within a period of 90 days after the effective date of this act on claims heretofore accrued.

Section 2. Any law in conflict herewith to that extent is repealed hereby.

Section 3. It hereby is adjudged and declared that existing conditions are such that this act is necessary for the immediate preservation of the public peace, health and safety; and an emergency hereby is declared to exist, and this act shall take effect and be in full force and effect from and after its passage.

Said law was enacted March 10, 1943, and by its terms became immediately effective.

It Is Further Ordered that this action presents for decision the following

ISSUES OF FACT AND LAW

1. Whether Chapter 265 of Oregon Laws 1943 as set out above is a bar to the maintenance of this action.

2. Whether, since about October, 1942, plaintiff has been and now is a resident and citizen of the State of Washington .

I.

Defendant's Contentions.

Defendant contends that this is an action for overtime and premium pay and for penlties thereunder required or authorized by the Fair Labor Standards Act, and since it was not commenced [21] within the time limited by Chapter 265 of Oregon Laws 1943 as set out hereinabove, it may not be maintained.

II.

1. Plaintiff contends that Chapter 265 Oregon Laws 1943 has no application to the plaintiff in this action brought under the Fair Labor Standards Act of 1938, 19 U.S.C.A., Sections 201-219, inclusive.

2. That during the time plaintiff worked for defendant and for which he makes his claim for overtime wages and pay, from about July, 1941, to September, 1942, he was a resident and citizen of the State of Oregon; and that since about October, 1942, he has been and now is a resident and citizen of the State of Washington.

3. Plaintiff contends that as construed and applied by the defendant, said Chapter 265 Oregon Laws 1943 violates Article 1, Section 8, of the United States Constitution in that it interferes with the power of congress to regulate commerce among the several states in a field already occupied by Congress.

4. Plaintiff contends that as construed and applied by the defendant said Chapter 265 Oregon Laws 1943 violates the Fourteenth Amendment of the United States Constitution in that it deprives plaintiff of his property without due process of law; and that it denies plaintiff the equal protection of the laws.

5. Plaintiff contends that on its face, Chapter 265 Oregon Laws 1943 violates Article 1, Section 8, of the United States Constitution in that it interferes with the power of Congress to regulate commerce among the several states in a field already occupied by Congress.

6. Plaintiff contends that on its face, Chapter 265 Oregon Laws 1943 violates the Fourteenth Amendment of the United States Constitution in that it deprives plaintiff of his property [22] without due process of law; and that it denies plaintiff the equal protection of the laws.

7. Plaintiff contends that, as construed and applied by the defendant, said Chapter 265 Oregon Laws 1943, violates Article I, Section 10, of the United States Constitution in that it impairs the obligation of contracts in existence between the parties.

8. Plaintiff contends that on its face Chapter 265 Oregon Laws 1943, violates Article I, Section 10, of the United States Constitution in that it impairs the obligation of contracts in existence between the parties.

9. Plaintiff contends that, as construed and applied by the defendant, said Chapter 265 Oregon Laws 1943 violates Article VI of the United States Constitution in that it unreasonably discriminates against rights arising under the Fair Labor Standards Act of 1938, 29 U.S.C.A., Section 201-219, inclusive.

10. Plaintiff contends that on its face Chapter 265, Oregon Laws 1943, violates Article VI of the United States Constitution in that it unreasonably discriminates against rights arising under the Fair Labor Standards Act of 1938, 29 U.S.C.A., Section 201-219, inclusive.

It Is Further Ordered that the parties hereto, represented by their respective attorneys, have agreed:

I.

If the court should find plaintiff is entitled to prevail in this action on the issues presented, judgment shall be entered in his favor and against the defendant for the sum of \$427.38.

II.

If this court should find plaintiff is entitled to prevail in this action on the issues presented, judgment shall further be entered in his favor and against the defendant for such [23] further sum

as the court may adjudge reasonable at attorney's fees.

The foregoing is certified to be a record of the proceedings had at the pretrial of this court, and it is

Ordered that the issues to be tried herein shall be those herein set forth as issues of law and fact; it is further

Ordered that the pretrial conference in this case having been held and participated in by all parties, the pleadings now pass out of the case, and the foregoing pretrial order shall control the subsequent course of the trial and shall not be hereafter amended except by consent of the parties or by order of the Court to prevent manifest injustice.

Done and dated in open court this 24th day of November 1944.

CLAUDE McCOLLOCH

United States District Judge.

Approved:

CARL D. ETLING

Of Attorneys for Plaintiff.

R. N. KAVANAUGH

Of Attorneys for Defendant.

R. R. MORRIS

Of Attorneys for Defendant.

HUGH L. BIGGS

Of Attorneys for Defendant.

[Endorsed]: Filed Nov. 24, 1944. [24]

TESTIMONY OF P. N. KURTH

(Tr. Pages 3-8)

P. N. KURTH,

the plaintiff, was thereupon produced as a witness in his own behalf and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Etling:

Q. Will you state your name, please.

A. P. N. Kurth.

Q. And are you the plaintiff in the case of P. N. Kurth v. Clarke Lumber Company, No. Civil 2373?

A. Yes, sir.

Q. And where do you live, Mr. Kurth?

A. Vancouver, Washington.

Q. And what is your occupation?

A. Truck driver now.

Q. I beg pardon? A. Truck driver.

Q. Were you formerly employed by the defendant in this case, the Clarke Lumber Company, at Sweet Home, Oregon?

A. Yes, sir.

Q. And in what capacity were you employed by the defendant?

A. Fireman and engineer.

Q. Fireman and engineer? A. Yes, sir.

Q. During what dates were you employed by the defendant?

A. From about October, 1940, to September, 1942.

Q. And in this connection you are making a claim against defendant for overtime wages under the Fair Labor Standards Act of August '38?

(Testimony of P. N. Kurth.)

A. Yes, sir.

Q. And are you asserting this claim for wages earned? You are asserting this claim for wages during what date?

A. From about July, 1941, to September, 1942.
[25]

Q. Now during the time you worked for the defendant in its mill at Sweet Home, Oregon, where did you live?

A. At Sweet Home.

Q. And did you move from Sweet Home subsequently?

A. Yes, sir.

Q. And when did you move?

A. September, 1942.

Q. And where did you go?

A. Portland.

Q. To Portland. How long did you live in Portland?

A. About a month.

Q. And did you leave Portland?

A. Yes, sir.

Q. Where did you go?

A. Vancouver, Washington.

Q. Now when did you move from Portland, Oregon, to Vancouver, Washington?

A. It was——

Q. Just approximately what month?

A. The first part of October, I think.

Q. The first part of October, 1942?

A. Yes, sir.

Q. Have you lived anywhere else since you moved to Vancouver, Washington?

A. No, sir.

Q. Until the present time?

A. No, sir.

(Testimony of P. N. Kurth.)

Q. Do you have a family? A. Yes, sir.

Q. And did your family move with you to Washington? A. Yes, sir.

Q. When you moved to Vancouver, Washington, from Oregon, was it your intention to acquire a new residence and domicile? [26]

A. Yes, sir.

Q. And do you own your home there?

A. Yes, sir.

Q. Did you own your home there prior to moving there? A. No, sir.

Q. You purchased a home? A. Yes.

The Court: When did he purchase it?

Mr. Etling: Q. When did you purchase your home in Washington?

A. Along about November, 1942.

Q. Now what is the address of the home you purchased?

The Court: That is all you need to show.

A. Route 4, Box 208.

The Court: Cross examine.

Mr. Etling: There is one more point I want to bring out, your Honor?

The Court: What is it?

Mr. Etling: Q. That is, did the plaintiff have any actual knowledge whatsoever, either before or at the time he filed this action, that the 1943 Oregon Legislature had passed a law, Chapter 265, Oregon Laws, 1943, imposing a statute of limitations on actions for overtime pay?

(Testimony of P. N. Kurth.)

Mr. Biggs: We will object to that for the purpose of the record, if the Court please, on the ground it is immaterial.

The Court: He may answer, subject to the objection. Answer. Did you know? Did you know about this law? A. No, sir.

The Court: Did you, Mr. Etling?

Mr. Etling: No, I didn't.

The Court: Cross examine.

Cross Examination

By Mr. Biggs: [27]

Q. By whom are you employed as truck driver, Mr. Kurth?

A. Vancouver Housing Authority.

Q. Vancouver Housing Authority?

A. Yes, sir.

Q. And for how long?

A. The last two years.

Q. Ever since you have been in Vancouver?

A. Yes, sir.

Q. You have been employed by the Housing Authority?

The Court: Do you intend to contest diversity of citizenship?

Mr. Biggs: No, your Honor. I don't intend to contest the residence. I just want to show any other facts that might be material.

Q. What area did you serve with your truck, Mr. Kurth?

A. The project they call Ogden Meadows.

Q. That is in Vancouver, is it?

(Testimony of P. N. Kurth.)

A. On the outskirts.

Q. And were you required to haul material from Oregon? A. No, sir.

Q. Did you do hauling from Oregon at all?

A. Not that I know of.

Q. I was just wondering if in connection with your business you had occasion to come over to Portland, and in and around Portland, during that period of two years? A. No, sir.

Q. Pardon me? A. No, sir.

Q. You did some of your trading, though, in Portland, I suppose? A. Yes, sir. [28]

Q. And Vancouver is part of the Metropolitan Portland area, is it not? A. Yes, sir.

Q. You probably took Portland newspapers?

A. Yes, sir.

Mr. Biggs: That is all.

(Witness excused.) [29]

REMARKS OF JUDGE IN DECIDING CASE

(Tr. Pages 115-119.)

The Court: It doesn't matter. This Act was passed on March 20th.

Mr. Biggs: That is correct.

The Court: And it was approved by the Governor on that date and it became effective immediately, and so the ninety days as to accrued claims began to run then, so they all ran out June 20th,

approximately, and the 1942 Session Laws were published and in the hands of the profession sometime early in June and there were nine or ten days, you said here the other day, between the time of the publication.

Mr. Davies: I am sure it would not exceed two weeks probably. It might have been somewhere between ten days and two weeks.

The Court: As bearing on the question of reasonableness of this legislation I attach a great importance to that, and I attach considerable importance to the reaction in the profession to that tinkering that was done with the practice act back there in 1927. The reaction was very violent. I haven't had time to go back and look over the periodicals of the time but I am sure that the Bar Associations in the state took some action about it and took a firm position against that sort of legislation. I am told, further, that the reason for that 1927 Act was because of a particular situation in a particular county. There was a lawyer's fight in a certain county in the state, and so that was the idea. The gentlemen on the bottom of the heap decided the way to correct that situation was to go to Salem and have the Legislature pass an act prohibiting the trial judge thereafter from extending *ex parte* the time when transcripts for appeal might be filed, as that Legislature dealt with, so all the unfortunate bystanders throughout the state who had appeals [30] being made up at that time, and relying on *ex parte* orders, got caught. I imagine they had a hard time explaining to their clients the mys-

terious processes of legislation. I don't think anybody could approve of that. I don't think anybody would.

My recollection has been Senator Rand's father was the one who had written the information. He had denounced that way of legislating on that kind of matter bitterly, although he felt impelled in upholding it, but the books show Judge Burnett wrote the opinion of the Court.

So in this case, as to the time element and as to the 90-day clause, I think as a practical matter I am dealing with the time that was allowed to the profession and to the interested parties pretty much after the law became public and notice to the profession through publication of the Session Law, which was, as it has been said, probably only about two weeks.

Now I have had lots of difficulty with the Koshkonong decision but I think I can and should follow the construction that has been put on the statute by the state judge who ruled on it, which has been presented. You all know that, getting in the Federal Courts, we are bound, even before *Erie v. Thompson*, we are bound in the construction of state statutes by the construction given them by the local judges, and this opinion you have given me from Judge Skipworth dealt with the same kind of a case as this presented here. It was a man who had an accrued claim and who brought his claim, not only more than ninety days after the passage of the Act but he brought it more than six months after the passage of the Act. So the questions were im-

plicit in the same record before Judge Skipworth as are present here and Judge Skipworth goes the whole length in upholding the statute and denies the man relief down there and says it is a bar against the prosecuting of his claim, not because he didn't bring it within six months but because he didn't bring it within ninety days. And so it seems to me that would be just going afield, unnecessarily and improperly, if I approach a decision [31] in this case in any different way than Judge Skipworth approached a decision of an exactly similar case. He thought he was upholding the 90-day clause, and says so, and said that was what the man's rights were to be tested by, and that is what he tested them by.

So I think the question I have to decide here, and the only one I have to decide, and the only one I wish to decide, is, taking that construction of the statute, guided by the local judge as to whether the 90-day statute is unreasonable in its effect on the operation of the Federal Wages and Hours Act, under which this man claims, and because I attach so much importance as a practical matter to the working of the emergency clause, by that I mean the fact that the statute didn't come to the notice of the public through the usual channels, the publication of the official Session Laws, until a very short time before the 90-day period ran out, I don't feel able to uphold the 90-day clause, contrary to Judge Skipworth's rulings. I am bound by his ruling, I feel, as to the state Constitutional questions that have been presented.

While the point was raised by Mr. Etling, this morning for the first time, that this was an amendment to the existing limitations statute, and did not comply with the procedural requirement of the state Constitution, that was implicit in the case before Judge Skipworth and while not presented to him there it would be presumptuous for me to consider it here, but I am not bound by Judge Skipworth's holding as to the Federal question, whether or not the 90-day clause as to accrued claims arising in the Federal Wages and Hours Act, and I take a contrary opinion and will allow recovery, and will allow Mr. Etling \$250 attorney's fees.

Mr. Etling: \$250, your Honor?

The Court: Yes. Adjourn court until tomorrow morning, ten o'clock.

(Thereupon, at 12:40 o'clock P. M., Court was adjourned.) [32]

Due and legal service of the within designation of contents of record on appeal is hereby admitted at Portland, Oregon, this 16th day of April, 1945.

C. D. Etling

Of Attorneys for Plaintiff

[33]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause came on regularly for trial on November 24, 1944 before the Honorable Claude McCul-

loch, one of the Judges of the above entitled Court, sitting without a jury, and the plaintiff appearing in person, and by Mrssrs. Carl D. Etling and Bruce Cameron, his attorneys, and the defendant appearing by Messrs. Richard R. Morris, David L. Davies and Hugh L. Biggs, of its attorneys, and the Court having heard and considered evidence on behalf of the plaintiff pursuant to the pre-trial order heretofore agreed upon on the question of residence of the plaintiff, the rest of the facts necessary for this decision having been stipulated and agreed upon in said pre-trial order, and briefs having been submitted by the parties hereto, and the Court having heard and considered arguments of counsel, and having fully considered all matters of law and fact presented at the trial hereof, and being now fully advised, makes the following Findings of Fact:

FINDINGS OF FACT

I.

That plaintiff commenced this action on February 10, 1944, under Section 16 (b) of the Fair Labor Standards Act of 1938, which is an act of Congress of the United States for the regulation of commerce among the States (29 U.S.C.A., Sections 201-219, inclusive) to recover unpaid overtime compensation, an additional equal amount as liquidated damages, and his reasonable attorney's fees. [34]

II.

That during the time plaintiff worked for defendant and for which he makes his claim for over-

time wages and pay, from about July, 1941, to September, 1942, he was a resident and citizen of the State of Oregon; and that since October, 1942, he has been and now is a resident and citizen of the State of Washington.

III.

That since about November 12, 1940, the defendant has been, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business located in the City of Sweet Home, Oregon; that during all times pertinent hereto the defendant owned, maintained and operated, as it now does, a certain sawmill for the manufacture of sawlogs into lumber, which said mill has been, and now is, located in the City of Sweet Home, Oregon; That said lumber manufactured by defendant in its said sawmill is sold and shipped by means of railroad, etc., to various concerns located outside the State of Oregon, and a substantial portion of said lumber manufactured by said defendant was, and now is, shipped to states other than the State of Oregon, and said defendant during all of the times herein mentioned was, and now is, engaged in commerce and the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938, and was and now is subject to all the terms and provisions thereof.

IV.

That plaintiff was employed by the defendant as a fireman and engineer in its sawmill in the City of Sweet Home, Oregon, during the period from about July, 1941, to September, 1942, and in connection therewith was engaged in commerce and the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938.

V.

That on or about July 11, 1942, while still in the employ of defendant, plaintiff filed a complaint with the U. S. [35] Department of Labor, Wage and Hour Division, against the defendant regarding the wages alleged due and unpaid in his complaint, and that said Wage and Hour Division, pursuant to said complaint, made an investigation of defendant, and upon completion and termination of this investigation, plaintiff's records were returned to him by said Wage and Hour Division on or about October 14, 1943.

VI.

That frequent demands were made by and on behalf of plaintiff to defendant during the time he worked for defendant, and after he left defendant's employ and during the period aforementioned for said wages, and that thereafter, through his attorney, plaintiff made demands upon the defendant for said wages alleged due and unpaid in his complaint, sawmill has been, and now is, located in the City of and the defendant discussed these demands with said attorney for plaintiff in said attorney's office on or about November, 1943.

VII.

That this is an action by plaintiff for recovery of overtime pay allegedly accrued for work performed within the State of Oregon; that all services rendered by plaintiff to defendant were prior to September 2, 1942; that this action was instituted by plaintiff against the defendant on the 10th day of February, 1944.

VIII.

That Chapter 265 of Oregon Laws 1943 provides as follows:

Section 1. Recovery for overtime or premium pay accrued or accruing, including penalties thereunder, required or authorized by any statute shall be limited to such pay or penalties for work performed within six months immediately preceding the institution of any action or suit in any court for the recovery thereof; provided, that an action may be maintained within a period of 90 days after the effective date of this act on claims heretofore accrued. [36]

Section 2. Any law in conflict herewith to that extent is repealed hereby.

Section 3. It hereby is adjudged and declared that existing conditions are such that this act is necessary for the immediate preservation of the public peace, health and safety; and an emergency hereby is declared to exist, and this act shall take effect and be in full force and effect from and after its passage.

Said law was enacted March 10, 1943, and by its terms became immediately effective.

IX.

That Section 1-204 (2) Oregon Compiled Laws Annotated, 1940, provides that actions may be brought "within six years upon a liability created by statute, other than a penalty or forfeiture."

X.

That the parties agreed that if the Court should find plaintiff is entitled to prevail in this action on the issues presented in the pre-trial order, judgment shall be entered in his favor and against the defendant for the sum of \$427.38, and for such further sum as the court may adjudge reasonable as attorney's fees.

Based upon the Findings of Fact heretofore made herein, the Court makes and finds the following Conclusions of Law:

CONCLUSIONS OF LAW

I.

That this Court has jurisdiction of the parties and the subject matter of this cause of action.

II.

That Chapter 265 Oregon Laws 1943, is not a bar to the maintenance of this action.

III.

That the period of 90 days afforded by Chapter 265 Oregon Laws 1943 for the maintenance of this action is unreasonably short and that said law as it affects this action is unconstitutional and void for the following reason: [37]

That it unreasonably interferes with the normal operation of the Fair Labor Standards Act and thereby violates Article I, Section 8, of the United States Constitution in that it unreasonably interferes with the power of Congress to regulate commerce among the several states in a field already occupied by Congress.

IV.

That this claim and cause of action is based upon a liability created by statute.

V.

That this action was brought within the time afforded by Section 1-204 (2) Oregon Compiled Laws Annotated, 1940 the applicable state statute.

VI.

The plaintiff is entitled to prevail in this action on the issues presented by the pre-trial order, and is therefore entitled to judgment against the defendant for the amount of his unpaid overtime compensation, \$213.69, and an additional equal amount as liquidated damages, making a total of \$427.38.

VII.

That plaintiff is also entitled to the additional sum of \$250.00 taxed against the defendant as his reasonable attorney's fees; and for his costs and disbursements incurred in this action.

VIII.

That judgment may be entered against the defendant for the aforementioned amounts, and exe-

cution may issue against the defendant for the same.

Dated this 18th day of December, 1944.

CLAUDE McCOLLOCH

District Judge.

State of Oregon,

County of Multnomah—ss.

Due and legal service of the foregoing Findings of Fact and Conclusions of Law are hereby accepted this 15 day of December, [38] 1944, by receipt of certified copies thereof.

HUGH L. BIGGS

Of Attorneys for Defendant

[Endorsed]: Filed Dec. 18, 1944. [39]

[Title of District Court and Cause.]

**MOTION TO AMEND FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Comes now the defendant herein and moves the court for its order amending the findings of fact and conclusions of law heretofore filed herein in the following respects:

- (1) By eliminating finding of fact No. IX.
- (2) By eliminating conclusion of law No. V.

This motion is made on the ground and for the reason that said finding of fact and conclusion of law are not based upon any issues of fact or law raised by the pleadings nor otherwise presented to

the Court for decision in this case on the record herein.

RICHARD R. MORRIS

R. N. KAVANAUGH

HUGH L. BIGGS

DAVID L. DAVIES

Attorneys for Defendant.

[40]

State of Oregon

County of Multnomah—ss.

Due service of the within Motion is hereby accepted at Portland, Oregon this 22nd day of December, 1944 by receiving a copy thereof, duly certified to as such by Hugh L. Biggs of attorneys for defendant.

C. D. ETLING

Of Attorneys for Plaintiff

[Endorsed]: Filed Dec. 22, 1944 [41]

[Title of District Court and Cause.]

ORDER

This cause now coming on upon motion of the defendant for an order amending Findings of Fact and Conclusions of Law heretofore entered herein, plaintiff appearing in open court by Carl Etling, of his attorneys, defendant appearing in open court by Richard R. Morris and Hugh Biggs, of its attorneys, and the court having heard the arguments of counsel for and against said motion, having fully

considered the same, and now being advised, makes the following order:

It Is Hereby Considered, Ordered, And Adjudged that the said Conclusions of Law be and the same are hereby amended so as:

(1) To amend Conclusion of Law No. 5 to read as follows: "That this action was brought within the time provided by law..'

Done and dated in open court this 27th day of December, 1944.

CLAUDE McCULLOCH

District Judge

[Endorsed]: Filed Dec. 27, 1944 [42]

In the District Court of the United States
for the District of Oregon

No. Civ. 2373

P. N. KURTH

Plaintiff

vs.

E. H. CLARKE LUMBER COMPANY, an Ore-
gon corporation

Defendant

JUDGMENT

This cause having come on to be heard before the Honorable Claude McCulloch, a Judge of the above entitled Court, evidence, oral and by stipulation, having been submitted and this matter having been argued orally and briefs having been submitted by the respective parties, and the Court, after due consideration, having made and entered its Findings of Fact and Conclusions of Law, and this matter being now ready for judgment,

It Is Hereby Ordered And Adjudged that plaintiff have and judgment is hereby rendered against the defendant in the sum of \$213.69 and an additional amount as liquidated damages, making a total of \$427.38; and that plaintiff have, and judgment is hereby rendered against the defendant in the further sum of \$250.00 as reasonable attorneys' fees hereby fixed by the Court in that sum; and that plaintiff recover of and from the defendant his costs and disbursements incurred in this action, taxed in the sum of \$46.46;

And It Is Further Ordered And Adjudged that execution issue against the defendant for said sums.

Dated this 18th day of December, 1944.

CLAUDE McCULLOCH

District Judge

[Endorsed]: Filed Dec. 18, 1944 [43]

[Title of District Court and Cause.]

NOTICE OF APPEAL
TO CIRCUIT COURT OF APPEALS

Notice is hereby given that E. H. Clarke Lumber Company, an Oregon corporation, the defendant above named, hereby appeals to the Circuit Court of Appeals of the United States for the Ninth Circuit from the final judgment and the whole thereof, which was entered in this action on the 18th day of December, 1944, in favor of plaintiff and against defendant.

R. R. MORRIS

R. N. KAVANAUGH

HUGH L. BIGGS

DAVID L. DAVIES

Attorneys for Defendant

[44]

State of Oregon

County of Multnomah—ss.

Due service of the within Notice of Appeal to Circuit Court of Appeals is hereby accepted at Portland, Oregon, this 31st day of January, 1945

by receiving a copy thereof, duly certified to as such by Hugh L. Biggs of attorney for defendant.

CARL D. ETLING

Of Attorney for Plaintiff

[Endorsed]: Filed Feb. 1, 1945 [45]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT WILL RELY ON APPEAL.

The defendant having lately filed its notice of appeal from the judgment of this court to the Circuit Court of Appeals for the Ninth Circuit, and having designated portions of the record herein to be contained in the Record on Appeal, does hereby file its statement of the points upon which it intends to rely upon appeal.

1. The District Court erred in deciding that Chapter 265, Or. Laws, 1943, is not a bar to the maintenance of this action.

2. The District Court erred in deciding that Chapter 265, Or. Laws, 1943, as applied to this action unreasonably interferes with the normal operation of the Fair Labor Standards Acts (Title 29, USCA Section 201 ff.) and therefore violates the United States Constitution in that it unreasonably interferes with the power of Congress to regulate interstate commerce among the several states in a field already occupied by Congress.

3. The District Court erred in deciding that the ninety day period prescribed in the savings clause of Chapter 265 is unreasonably short and that

Chapter 265 applied to this action is unconstitutional and void.

4. That the District Court erred in rendering judgment in favor of plaintiff and against defendant.

5. That the District Court erred in refusing to decide that if the ninety day period prescribed in the savings clause of Chapter 265 is unreasonably short as applied to this action, the statute should be so construed as to make the period of six months prescribed in said statute applicable to this action.

R. R. MORRIS

R. N. KAVANAUGH

HUGH L. BIGGS

DAVID L. DAVIES

Attorneys for defendant and
appellant. [46]

Due and legal service of the within statements of points upon which appellant will rely on appeal is hereby admitted at Portland, Oregon, this 16th day of April, 1945.

C. D. ETLING

Of Attorneys for Plaintiff.

[Endorsed]: Filed April 16, 1945 [47]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

Defendant herein having lately filed its notice of appeal from the judgment of this court to the Circuit Court of Appeals for the Ninth Circuit hereby

designates the following portions of the record and proceedings in this case to be contained in the Record on Appeal.

1. Amended complaint.
2. Answer to amended complaint.
3. Motion to dismiss answer.
4. Pretrial order.
5. Testimony of the witness, P. N. Kurth (Tr. Pages 3-8).
6. Remarks of Judge in deciding case. (Tr. Pages 115-119).
7. Findings of Fact and Conclusions of Law.
8. Motion to amend Findings of Fact and Conclusions of Law.
9. Court's order on motion to amend Findings of Fact and Conclusions of Law.
10. Judgment.
11. Notice of appeal to Circuit Court of Appeals.
12. Notice of cross-appeal.
13. Statement of points upon which appellant will rely upon appeal.
14. Designation of contents of Record on appeal.

R. R. MORRIS

R. N. KAVANAUGH

DAVID L. DAVIES

HUGH L. BIGGS

Attorneys for Defendant and
Appellant.

[Endorsed]: Filed April 16, 1945. [48]

[Title of District Court and Cause.]

NOTICE OF CROSS-APPEAL

Notice is hereby given that P. N. Kurth, the plaintiff above named, hereby cross-appeals to the Circuit Court of Appeals of the United States for the Ninth Circuit from that part only of the final judgment which was entered in this action on the 18th day of December, 1944, fixing \$250.00 as reasonable attorney's fees in favor of the plaintiff and against the defendant.

Dated this 13th day of February, 1945.

CARL D. ETLING

BRUCE CAMERON

Attorneys for Plaintiff

Service of the foregoing notice of cross-appeal is hereby accepted this 20th day of February, 1945.

HUGH L. BIGGS

Of Attorneys for Defendant.

[Endorsed]: Filed Feb. 20, 1945 [49]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
CROSS-APPELLANT WILL RELY ON
CROSS-APPEAL.

The plaintiff and cross-appellant having filed his notice of cross-appeal from the judgment of this court to the Circuit Court of Appeals for the Ninth Circuit, and having filed his designation of addi-

tional portions of the record and proceedings to be contained in the Record on Appeal, does hereby file his statement of points upon which he intends to rely on cross-appeal:

1. The Court erred in finding and concluding that plaintiff is entitled only to \$250.00 as reasonable attorney's fees for the reason that based upon the record, proceedings, and evidence in this case such sum is clearly inadequate.

2. The finding and conclusion of the Court that plaintiff is entitled to only \$250.00 as reasonable attorney's fees is also inadequate to compensate plaintiff and the cross-appellant for the extra work entailed in this appeal.

Respectfully submitted,

CARL D. ETLING

BRUCE CAMERON

Attorneys for Plaintiff and
Cross-Appellant.

Due and legal service of the foregoing statement of points is hereby accepted at Portland, Oregon this 20 day of April, 1945, by receipt of a certified copy thereof.

HUGH L. BIGGS

Of Attorneys for Defendant.

[Endorsed]: Filed April 20, 1945 [50]

[Title of District Court and Cause.]

DOCKET ENTRIES

1944

- Feb. 10—Filed complaint.
- Feb. 10—Issued summons to Marshal.
- Feb. 18—Filed summons with Marshal's return of service.
- Mar. 13—Docketed and entered default. Fee
- Mar. 20—Filed motion of deft. to set aside default.
- Mar. 20—Filed docketed and entered order setting aside default. Fee
- Mar. 20—Docketed and entered order setting for pre-trial on March 27, 1944 Attys. notified.
- Mar. 22—Filed pltf's motion to produce under rule 34.
- Mar. 20—Filed answer of deft.
- Mar. 20—Filed stipulation that order of default be vacated.
- Mar. 27—Filed motion to produce under rule 34 (amended). Etling.
- Mar. 27—Docketed and entered record of pre-trial conference and continuance to April 10, 1944 and order admitting Karl Rodman as attorney and order canceling same. Fee
- Apr. 10—Docketed and entered record of hearing on ptff's motion to produce and order allowing and record of pre-trial conference. Holcomb R. Fee
- Apr. 24—Filed stipulation for order to file amended complaint.

1944

- Apr. 24—Filed and entered order to file amended complaint. Fee.
- Apr. 24—Filed motion for order to file amended complaint.
- Apr. 24—Filed amended complaint.
- May 4—Filed motion of atty. Kavanaugh for time to file answer to amended complaint.
- May 4—Filed stipulation extending time to May 8, to file answer to amended complaint.
- May 4—Filed docketed and entered order allowing deft. to May 8 to file answer to amended complaint. Fee
- May 8—Filed answer to ptff to strike and to dismiss as to answer.
- May 13—Filed motion of ptff to strike and to dismiss as to answers.
- May 15—Record of pre-trial and cont. to May 22, 1944 and order reserving motions. Fee
- May 22—Record of further pre-trial. Fee
- June 9—Pre-trial order submitted to Judge. Fee
- July 14—Filed plaintiff's brief.
- Sept. 18—Entered order allowing deft. 10 days to file brief; allowing ptff "a reasonable time to reply and continuing for argument on legal question. Fee
- Sept. 27—Filed defendant's brief.
- Oct. 30—Entered order setting for hearing on Nov. 26, 1944. Fee
- Oct. 31—Entered order setting for hearing on Nov. 22, 1944. Fee

1944

- Nov. 17—Entered order resetting for hearing on
Nov. 24, 1944 at 10 a. m. (attys. notified) McC
- Nov. 24—Filed and entered pre-trial order. McC
- Nov. 24—Record of trial before court. taken under
advisement. (Person Rep.) McC
- [51]
- Dec. 8—Record of trial resumed — Record of
opinion allowing recovery by pltfs. and
\$250.00 atty. fees and order to prepare
finding, conclusions and judgment. McC
- Dec. 18—Filed and entered Findings of Fact and
Conclusions of Law McC
- Dec. 18—Filed and entered Judgment for Pltf.
McC
- Dec. 18—Filed notice in connection with taxation
of costs.
- Dec. 22—Filed motion to amend findings of fact
and conclusions of law.
- Dec. 26—Record of hearing on above motion —
taken under advisement. McC
- Dec. 27—Filed and entered order to amend con-
clusion of law #5 McC.

1945

- Feb. 1—Filed notice of appeal by defendant
(copy served by deft.)
- Feb. 19—Filed and entered order approving bond
and granting supersedeas. McC
- Feb. 19—Filed supersedeas bond. McC
- Feb. 20—Filed notice of cross-appeal by ptf.
- Feb. 20—Filed cost bond on cross-appeal.

1945

- Mar. 9—Filed stipulation for extending time of filing record of appeal.
- Mar. 9—Filed motion for extending time of filing record of appeal.
- Mar. 9—Filed and entered order extending time of filing record of appeal to April 12, 1945
- Mar. 9—Filed transcript of evidence to arguments in duplicate.
- Apr. 9—Filed motion to extend time for docketing record on appeal.
- Apr. 9—Filed stipulation.
- Apr. 9—Filed and entered order on above motion. McC.
- Apr. 16—Filed designation of contents of record on appeal.
- Apr. 16—Filed statement of points upon which appellant will rely on appeal.
- Apr. 20—Filed statement of points of cross-appellant.
- Apr. 20—Filed designation of record by cross-appellant.
- Apr. 20—Filed docketed and entered order to include transcript of evidence and arguments. McC
- Apr. 23—Filed additional designation by cross-appellant. [52]

[Title of District Court and Cause.]

ORDER

It appearing that the Designation of Contents of the Record on Appeal in the above entitled cause does not include the transcript of Evidence and Arguments of November 24, 1944, December 8, 1944 and December 26, 1944 but only includes pages 3 to 8 and pages 115 to 119 inclusive of the transcript and that the remainder of the transcript has been omitted from the record on appeal, and the court being of the opinion that the entire transcript of proceedings should be presented to the appellate court for consideration,

Now, Therefore, It Is Hereby Ordered that pursuant to Rule 75 (h) of the Federal Rules of Civil Procedure, the entire transcript of the proceedings above mentioned be included by the Clerk of this Court in the Record on Appeal.

Dated this 20th day of April, 1945.

CLAUDE McCOLLOCH

Judge

[Endorsed]: Filed April 20, 1945 [53]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS
OF RECORD AND PROCEEDINGS.

Plaintiff and cross-appellant to the United States Circuit Court of Appeals for the Ninth Circuit

hereby designates the following additional portions of the record and proceedings in this case to be contained in the Record on Appeal.

1. Transcript of United States District Court Clerk's docket entries.

2. Statement of points upon which cross-appellant will rely upon cross-appeal.

3. Designation of additional portions of record on cross-appeal by cross-appellant.

4. Notice of Cross Appeal.

Respectfully submitted,

CARL D. ETLING

BRUCE CAMERON

Attorneys for Plaintiff and
Cross-Appellant.

Due and legal service of the foregoing designation of record is hereby accepted at Portland, Oregon this 20 day of April, 1945, by receipt of a certified copy thereof.

HUGH L. BIGGS

Of Attorneys for Defendant.

[Endorsed]: Filed April 20, 1945 [54]

[Title of District Court and Cause.]

ADDITIONAL DESIGNATION
BY PLAINTIFF CROSS-APPELLANT.

Plaintiff and cross-appellant to the United States Circuit Court of Appeals for the Ninth Circuit hereby designates the following additional portions of the record and proceedings in this case to be contained in the Record on Appeal.

1. Court's order to transmit Transcript of Evidence and Arguments to Circuit of Appeals.

2. Additional designation by Plaintiff Cross-Appellant.

Respectfully submitted,

CARL D. ETLING

BRUCE CAMERON

Attorneys for Plaintiff and
Cross-Appellant.

Due and legal service of the foregoing additional designation of record is hereby accepted at Portland, Oregon this 23rd day of April, 1945, by receipt of a certified copy thereof.

HUGH L. BIGGS

Of Attorneys for Defendant.

[Endorsed]: Filed April 23, 1945 [55]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America

District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 56 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 2373, in which E. H. Clarke Lumber Company, an Oregon corporation is defendant and appellant and

P. N. Kurth, is plaintiff and appellee; that said transcript has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and appellee and in accordance with the rules of Court; that I have compared the foregoing transcript of the record and proceedings had in said court in said cause, in accordance with the said resignations, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of filing notice of appeal is \$5.00 and comparing and certifying the within transcript is \$17.90 for appellant and for filing notice of cross-appeal is \$5.00 and for comparing and certifying transcript is \$18.90 for cross-appellant and that the same has been paid.

I further certify that I have enclosed transcript of the testimony taken in this cause together with original order extending time for defendant to file and docket appeal from April 12, 1945 to and including May 2, 1945.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 25th day of April, 1945.

[Seal] LOWELL MUNDORFF,

Clerk

By F. L. BUCK

Chief Deputy [56]

In the District Court of the United States
For the District of Oregon

Civil No. 2373.

P. N. KURTH,

Plaintiff,

vs.

E. H. CLARKE LUMBER COMPANY,
an Oregon corporation,

Defendant.

TRANSCRIPT OF EVIDENCE
AND ARGUMENTS

November 24, 1944

December 8, 1944

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[Title of District Court and Cause.]

Portland, Oregon, Friday, November 24, 1944

10:20 o'clock A.M.

Before: Honorable Claude McColloch, Judge.

Appearances:

Messrs. Carl D. Etling and Bruce Cameron,
Attorneys for the Plaintiff.

Messrs. R. R. Morris, David L. Davies and
Hugh L. Biggs, Attorneys for the Defendant.

TRANSCRIPT

The Court: Now Mr. Etling, we are ready.

Mr. Etling: If the Court please, according to the pre-trial order——

The Court: I haven't seen anything about a pre-trial order. I just came by and spoke to Judge Fee and he told me his recollection was there was a pre-trial.

Mr. Biggs: I think I have an extra copy here, your Honor.

The Court: Was there a pre-trial transcript?

Mr. Etling: No, your Honor.

Mr. Biggs: No transcript.

The Court: Well, on such an important matter a transcript should be made of what was said at the pre-trial.

Mr. Etling: I don't believe it was.

The Court: What do you think it is, then, with-

out my reading the order? It is a submission of a statement of facts here?

Mr. Biggs: Yes, your Honor, largely so. There is one point of testimony.

The Court: Does it call for testimony?

Mr. Biggs: Just a little bit. I think Mr. Etling wants to prove the residence of his client.

The Court: Go on now. Is this, from your point of view, a final submission?

Mr. Etling: This is the trial.

The Court: All right. Better put on the testimony then.

Mr. Etling: As I see it, there are just two issues; whether Chapter 265, Oregon Laws, 1943, as set out in the pre-trial order, is a bar to the maintenance of this action, and the other is since about October, 1942, plaintiff has been and now is a resident and citizen of the State of Washington. [2*]

We will call Mr. Kurth.

P. N. KURTH,

the plaintiff, was thereupon produced as a witness in his own behalf and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Etling:

Q. Will you state your name, please?

A. P. N. Kurth.

*Page numbering appearing at top of page of original certified Transcript.

(Testimony of P. N. Kurth.)

Q. And are you the plaintiff in the case of P. N. Kurth v Clarke Lumber Company, No. Civil 2373?

A. Yes, sir.

Q. And where do you live, Mr. Kurth?

A. Vancouver, Washington.

Q. And what is your occupation?

A. Truck driver now.

Q. I beg pardon? A. Truck driver.

Q. Were you formerly employed by the defendant in this case, the Clarke Lumber Company, at Sweet Home, Oregon?

A. Yes, sir.

Q. And in what capacity were you employed by the defendant?

A. Fireman and engineer.

Q. Fireman and engineer?

A. Yes, sir. [3]

Q. During what dates were you employed by the defendant?

A. From about October, 1940, to September, 1942.

Q. And in this connection you are making a claim against defendant for overtime wages under the Fair Labor Standards Act of August, '38?

A. Yes, sir.

Q. And are you asserting this claim for wages earned? You are asserting this claim for wages during what date?

A. From about July, 1941, to September, 1942.

Q. Now during the time you worked for the defendant in its mill at Sweet Home, Oregon, where did you live?

A. At Sweet Home.

(Testimony of P. N. Kurth.)

Q. And did you move from Sweet Home subsequently? A. Yes, sir.

Q. And when did you move?

A. September, 1942.

Q. And where did you go? A. Portland.

Q. To Portland. How long did you live in Portland? A. About a month.

Q. And did you leave Portland?

A. Yes, sir.

Q. Where did you go?

A. Vancouver, Washington.

Q. Now when did you move from Portland, Oregon to Vancouver, [4] Washington?

A. It was——

Q. Just approximately what month?

A. The first part of October, I think.

Q. The first part of October, 1942?

A. Yes, sir.

Q. Have you lived anywhere else since you moved to Vancouver, Washington?

A. No, sir.

Q. Until the present time?

A. No, sir.

Q. Do you have a family? A. Yes, sir.

Q. And did your family move with you to Washington? A. Yes, sir.

Q. When you moved to Vancouver, Washington, from Oregon, was it your intention to acquire a new residence and domicile? A. Yes, sir.

Q. And do you own your home there?

A. Yes, sir.

(Testimony of P. N. Kurth.)

Q. Did you own your home there prior to moving there? A. No, sir.

Q. You purchased a home? A. Yes.

The Court: When did he purchase it? [5]

Mr. Etling: Q. When did you purchase your home in Washington?

A. Along about November, 1942.

Q. Now what is the address of the home you purchased?

The Court: That is all you need to show.

A. Route 4, Box 208.

The Court: Cross examine.

Mr. Etling: There is one more point I want to bring out, your Honor.

The Court: What is it?

Mr. Etling: Q. That is, did the plaintiff have any actual knowledge whatsoever, either before or at the time he filed this action, that the 1943 Oregon Legislature had passed a law, Chapter 265, Oregon Laws, 1943, imposing a statute of limitations on actions for overtime pay?

Mr. Biggs: We will object to that for the purpose of the record, if the Court please, on the ground it is immaterial.

The Court: He may answer, subject to the objection. Answer. Did you know? Did you know about this law?

A. No, sir.

The Court: Did you, Mr. Etling?

Mr. Etling: No, I didn't.

The Court: Cross examine.

(Testimony of P. N. Kurth.)

Cross Examination

By Mr. Biggs: [6]

Q. By whom are you employed as truck driver, Mr. Kurth?

A. Vancouver Housing Authority.

Q. Vancouver Housing Authority?

A. Yes, sir.

Q. And for how long?

A. The last two years.

Q. Ever since you have been in Vancouver?

A. Yes, sir.

Q. You have been employed by the Housing Authority?

The Court: Do you intend to contest diversity of citizenship?

Mr. Biggs: No, your Honor. I don't intend to contest the residence. I just want to show any other facts that might be material.

Q. What area did you serve with your truck, Mr. Kurth?

A. The project they call Ogden Meadows.

Q. That is in Vancouver, is it?

A. On the outskirts.

Q. And were you required to haul material from Oregon? A. No, sir.

Q. Did you do any hauling from Oregon at all?

A. Not that I know of.

Q. I was just wondering if in connection with your business you had occasion to come over to Portland, and in and around Portland, during that period of two years? [7] A. No, sir.

(Testimony of P. N. Kurth.)

Q. Pardon me? A. No, sir.

Q. You did some of your trading, though, in Portland, I suppose? A. Yes, sir.

Q. And Vancouver is part of the Metropolitan Portland area, is it not? A. Yes, sir.

Q. You probably took Portland newspapers?

A. Yes, sir.

Mr. Biggs: That is all.

(Witness excused.)

The Court: Now you take half an hour and let the other side take a half an hour and see where we land, if you need a half hour.

Mr. Biggs: We may not need a half hour.

Mr. Etling: If the Court please, I would like to find out at this time whether or not the defendant is willing to stipulate on this matter of residence in order to simplify the record, and amend the **pre-trial order**?

The Court: Oh, I don't think we need to do that. He says he is not making any point of it, and the testimony is deemed adequate.

Mr. Etling: Now, your Honor has indicated you have already [8] read the briefs in this matter and I believe the briefs are quite complete on the subject and therefore I don't want to ask to read them, or anything of that sort——

The Court: Oh, yes. You have agreed on the merits in the claim?

Mr. Biggs: Yes, your Honor.

The Court: All right.

Mr. Etling: I may briefly outline the facts. This

action was commenced on February 10th, 1944, for Section 16(b) of the Fair Labor Standards Act of 1938 to recover overtime compensation, and an additional amount as liquidated damages and attorney fee, and for the convenience of the Court we have supplied a copy of the Fair Labor Standards Act.

The Court: What have you done about the attorney fee?

Mr. Etling: That question has been submitted to the Court as to the question of the reasonable attorney fee.

The Court: All right.

Mr. Etling: There is no sum agreed on. I might mention that in our original complaint we did not anticipate the sort of a case we ran into. We asked for \$150. We filed an amended complaint asking for \$250, but at that time in our computation began to increase, and I don't believe that is anywhere near a reasonable fee at this time, so it is submitted as an open question.

The Court: Look at the reputation if you win the case. [9]

Mr. Etling: The admitted facts are these, briefly: It is admitted by the plaintiff that plaintiff brings this action under the Fair Labor Standards Act and defendant corporation owning and operating the sawmill in Sweet Home, Oregon, for the manufacture of saw logs into lumber; that a substantial portion of said lumber is sold and shipped by means of railroad, and so forth, to various sources outside of the State of Oregon, and that de-

dendant was and now is engaged in commerce and the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938, and was and now is subject to all the terms and provisions thereof; and that plaintiff was employed by defendant in its said sawmill from about July, 1941, to September, 1942, and in connection therewith was engaged in commerce and the production of goods for commerce within the meaning of the Fair Labor Standards Act.

That on or about July 11, 1942, while still in the employ of the defendant, plaintiff filed a complaint with the United States Department of Labor, Wage and Hour Division, against the defendant regarding the wages due him, and the Wage and Hour Division made an investigation pursuant to that complaint. Upon the completion and termination of this investigation plaintiff's records were returned to him. He received them about October, 1943. That frequent admissions were made by and on behalf of plaintiff to the defendant—— [10]

The Court: You want to discuss that when your time comes, whether that is just extra statutory practice or whether that is provided by the statute or regulations. I am pointing to your side. Mr. Biggs.

Mr. Biggs: Yes, your Honor.

Mr. Etling: These demands were made on behalf of plaintiff to defendant during the time he worked for defendant and after he left defendant's employ, for the wages, terminating the demands

made on defendant by plaintiff's attorney in about November, 1943. And, as I before stated, it is agreed that if the Court should find that plaintiff should prevail on the issues presented, judgment should be entered in his favor in the sum of \$426.38 and for the reasonable attorneys' fees, and I have before stated the issues.

Now defendant's contentions in this matter are based solely on this Chapter 265, Oregon Laws, 1943, and which I will read just for the sake of my argument:

"Recovery for overtime or premium pay accrued or accruing, including penalties thereunder, required or authorized by any statute, shall be limited to such pay or penalties for work performed within six months immediately preceding the institution of any action or suit in any court for the recovery thereof; provided, that an action may be maintained within a period of ninety days after the effective date of this Act on claims heretofore accrued." [11]

And this law carried an emergency clause and became effective on the day of its passage, March 10th, 1943.

The plaintiff was a resident of Oregon during all times he worked for the defendant.

Prior to the passage of this Act the statute of limitations in Oregon was six years.

Now it is our contentions that there are three points involved here. First, that this Oregon law has no application to the plaintiff in this case, brought under the Fair Labor Standards Act; and, two, as construed and applied by the defendant,

that this Oregon law is unconstitutional and void; and, third, if the Court should find that this Oregon law is applicable, then that it is unreasonable and, therefore, unconstitutional on its face because it violates the Fourteenth Amendment, in that it deprives plaintiff of his property without due process of law, and it denies him the equal protection of the laws.

The Court: You just said the six-year statute was applicable, so if the six-year statute was applicable why, if it is constitutional, wouldn't the six-months statute be applicable?

Mr. Etling: Because it is unreasonable, your Honor.

The Court: Well, you just go around the barn when you concede that. I said that when you concede it is unconstitutional.

Mr. Etling: I see. And consequently that it is unconstitu- [12] tional, because it discriminates against a Federal statute, the Federal Labor Standards Act, and, therefore, violates Article 6 of the United States Constitution; and, three, that it violates Article 1, Section 10 of the United Staes Constitution, in that it impairs the obligations of contracts in existence between the parties prior to the passage of the Constitution; and, four, that it violates Article 1, Section 8 of the United States Constitution, in that it interferes with the regulation of interstate commerce, a field already occupied by Congress.

Now under the first point, the applicability, the defendant of course is relying on the Rules and

Decisions Act, and the Rules and Decisions Act is inapplicable to state legislation which is discriminately against rights established by Federal statute, but I have said before, this Oregon law was passed as an emergency legislation. The records of the District Court of the United States for the District of Oregon, and the records of the Circuit Court of the State of Oregon, including all thirty-six counties,—and that court has current jurisdiction of matters arising under the Fair Labor Standards Act,—During the year immediately following the passage of the Act—two years, a year preceding and a year following—twenty-eight cases involving claims for overtime pay were filed in these two courts. Only one of those cases was attempted to be brought under the [13] state statute, and that case was still out of court, so that case did not establish, and we have been unable to find any other cases establishing, that there is such a thing as a civil remedy for overtime pay under the Oregon statutes.

The Court: I should think you would have to prove that if you wanted me to consider it—data like that.

Mr. Etling: We have submitted the data in our brief, your Honor.

The Court: I know, but—

Mr. Etling: We ask the Court to take judicial knowledge.

The Court: I don't think I could.

Mr. Etling: This matter was discussed in pre-

trial conference. At that time Judge Fee indicated that the Court would.

The Court: That just indicates again you should have had a transcript of the pre-trial conference.

Mr. Etling: We wanted at that time to produce testimony on that point. The Court said it was unnecessary.

The Court: Maybe so. All I said was, I wouldn't think so. I am willing to be enlightened on it.

Mr. Etling: Of course we are now bound by the pre-trial order.

The Court: The pre-trial order does not say anything about that.

Mr. Etling: Well, may we call testimony on that point? [14]

The Court: Pass it for the present. I just mentioned it as we went by. If you rely on it heavily, I thought we ought to raise the point as you went by.

Mr. Etling: As I say, we have been unable to find any state statute providing a civil remedy, and the defendants have cited only one case, and that is the criminal case of *Bunting v. Oregon*, so they haven't been able to find any cases either where there has ever been a civil remedy for overtime pay under the Oregon statutes.

The Court: Well, there have been lots of cases filed in the Circuit Court. We all know that of our own experience. I have known that myself.

Mr. Etling: We have been unable to——

The Court: Well, that would be a very difficult matter to run down, especially going back over a period of time. Unless they have it gathered statistically someplace that would be very hard to find.

Mr. Etling: At the time we prepared that brief we didn't rely on these statistics. We also relied on the *Automotive Trades Magazine*, which stated that they, the *Automotive Trades Union*, joined with other interests in passing this statute of limitations.

The Court: I don't see how that is in the case, unless it is stipulated into the case.

Mr. Etling: I see. But since then—— [15]

The Court: What does the other side think about these current matters relied on?

Mr. Morris: If the Court please, during the pre-trial, when it was presented to Judge Fee on some motion, the question of filing a so-called economic brief arose, but Mr. Etling raised the question that economic data could be relied upon in explaining the background, or the possible sources of evil at which the law was aimed should be proven. We then said, or at least I said that as I understood the law the economic matter need not be proven because its purpose is not to prove the existence of the facts but merely to state what the legislature reasonably might have had in mind when the law was passed.

So far as the trade journal of the automobile dealers is concerned, I don't know what effect would be given to it, but I do think that either Mr. Etling or we are entitled to put in such economic data as we see fit, or which might lend some light on the subject matter, and it is not necessary to put it in evidence because we are not doubting the truth of those facts but only obtaining background.

Mr. Etling: Now as I say, at that time it appeared as though the defendant might make a point of that, but I believe in their brief they practically—it is my belief that they practically concede that the Oregon statute was passed and was intended to apply to the Fair Labor Standards Act—in- [16] tended to curtail it.

The Court: Well, I would be surprised if they would concede that.

Mr. Biggs: No, we don't concede that, your Honor. We concede that it applies and that the statute was drawn to bring it within its purview, together with any other statutes providing any other time for bringing suits, including our own Oregon statutes that so provide. We do not think that it was intended to discriminate against the Federal Act or that the Federal Act was its purpose.

Mr. Etling: We didn't intend to go that far. We have cited some cases, your Honor, on the applicability, such as *Campbell v. Haverhill*, which we consider a leading case on this matter, and in that case the application of the local statute of limitations to a patent infringement action instituted in the Federal Court was in question. It was contended that the *lex fori* can only apply to those matters within the jurisdiction of the state courts, and since at that time an action for patent infringement was enforceable only in the Federal Courts, the defendant argued that the Federal Courts were not bound to follow the local statute of limitations, since the state had neither the power to create the right nor the power to enforce the remedy.

The Court said: "Doubtless such an argument would apply with peculiar emphasis to statutes, if any such existed, [17] discriminating against causes of action enforceable only in the Federal Courts; as if they should apply a limitation of a year to actions for the infringement of patents, while the ordinary limitation of six years was applied to all other actions of tort."

And the Court went on to say subsequently, "it may be well questioned whether there is any sound distinction in principle between cases where the jurisdiction is concurrent and those where it is exclusive in the Federal Courts". The Court's reasoning is equally applicable to a statute of limitations, such as the Oregon statute, which discriminates against Federal rights under Section 16(b) of the Fair Labor Standards Act, in which cases the State and Federal Courts have concurrent jurisdiction, such as the case we have here.

Now from page 7 to page 15 of our brief we have cited quite a number of cases, and we have gone into the administration of the Fair Labor Standards Act, and to show the Court what a difficult matter, what a complicated matter it is for the Administrator to carry on, making these investigations, such as was made in this particular case. It is necessary to determine what is interstate commerce, whether the parties are within the Act, are engaged in interstate commerce; and I won't attempt to enlarge on that any further. I will submit that on the brief, for the reason that it would take me too much time.

The Court: That is one thing I can take judicial notice of.

Mr. Etling: The Supreme Court prescribed activities as difficult as squaring a circle in the *Kirschbaum v. Walling's* case. I will mention the recent case of *Addison v. Holly Hill*, which was decided by the Supreme Court on June 5th, 1944, relating to the question of exemptions under Section 13(a)(10) as affected by the definition of the Administrator as to the "area of production". The Court said:

"And so Congress left the boundary-making to the experienced and informed judgment of the Administrator. Thereby Congress gave the Administrator appropriate discretion to assess all the factors relevant to the subject matter, that is the fixing of minimum wages and minimum hours."

And in disposing of the case the Court said: "It is our view that the case should be remanded to the District Court with instructions to hold it until the Administrator, by making a valid determination of the area of production with all deliberate speed, acts within the authority given him by Congress."

That is an example of how the Supreme Court has attempted to work with the Administrator in determining these matters that have been presented to that administrative body, and, as we have pointed out in other cases also, the courts are reluctant to interfere with administrative processes. [19]

Persons are encouraged to exhaust their remedies before administrative tribunals, before coming to the Court.

The Court: And sometimes exhaust themselves.

Mr. Etling: Now they have cited the case of *Order of Railroad Telegraphers v. Railway Express Agency*, decided by the Court February 28th, 1944. Now that case arose before the Railroad Adjustment Board and we are well aware of the fact that there is a difference. The Railroad Adjustment Board has broader powers, but, nevertheless, it is an administrative agency. In that case the Court said:

“It is difficult to see how state statutes of limitations can restrict the power of the Federal Administrative tribunal to consider and adjust claims.”

And in that case the Court goes further in discussing the question of the statute of limitations. It says:

“Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.”

The Court: Just pardon an interruption. You and I had a case one time, Mr. Biggs, that had something to do with that Railroad Board.

Mr. Biggs: *Rogers v. Union Pacific*.

The Court: And you no doubt remember this case he is talking from now? [20]

Mr. Biggs: Yes, sir, I do.

The Court: I suppose there was some proceeding like *Rogers*’ that was being presented to the Board and the claim was the state statute of limitations barred it. Was that it?

Mr. Biggs: That was correct, your Honor. There was just this distinction, however: In the Telegraphers' case, if your Honor recalls, the Railroad Adjustment Act provides for submission of the case to the Adjustment Board, and when the award is then rendered by the Board he has a period of two years in which to bring his action on the award, and that is what the proceeding was in this Telegraphers' case. His time was gone under the state statute, but he had brought himself under the procedure of the Railroad Adjustment Act.

The Court: That is the two years?

Mr. Biggs: That is the two years, and the Court said, of course, the statute of limitations under the Railroad Adjustment Act applies and not the state statute.

The Court: That is what you meant someplace in your objection, when you said there could be a statute of limitations——

Mr. Biggs: Passed by Congress.

The Court: —written into this Wages and Hours Act?

Mr. Biggs: By Congress, yes.

The Court: But there is none?

Mr. Biggs: There is none.

Mr. Etling: And ordinarily it is covered by applicable state [21] statute. In this Telegraphers' case, as the Court noticed, the statute of limitations was six years; and even there where the matter was being pursued the Supreme Court refused to apply it. Now in this case it certainly can't be said that the defendant wasn't apprised of the fact

that the plaintiff was making a claim because his remedy was being pursued.

The Court: Better watch your time. Six or seven minutes more. I am not going to cut you off this morning but I wanted to get started.

Mr. Etling: Yes. Now on this question of non-residence, I cited the case of *Adams & Freese v. Kenoyer* in the brief, and that case, as far as non-residence is concerned, is analogous to the case before us. The Court, in considering whether the period allowed by state statute of limitations was reasonable and applicable to rights already accrued, entitling mortgagees to foreclose a mortgage, states:

“Whether the legislature, in fixing such time, makes it so short that the right to sue is practically denied, Courts will declare such time unreasonable, and refuse to enforce the law.”

The mortgagees in this case, on the date of the execution of the note and mortgage, were residents of North Dakota, but prior to the enactment of the statute of limitations moved to Missouri, the same as the case we had here, where they have ever since resided, and in further consider- [22] ing the non-residence of the mortgagees, the Court stated:

“In considering the validity of such a statute when applied to existing causes of action, it is both just and reasonable to assume what we all know to be true as a matter of common knowledge, that a large per cent of such persons, especially non-residents of the state, would not, in that short a period of time, acquire knowledge that such a vitally important statute to them had been enacted.”

That is a further reason why the statute is inapplicable and unreasonable.

Now our second point is, as construed by defendant, applied in this case, that the Oregon law is unconstitutional and it is unconstitutional for the reasons that we have hereinafter set forth in our brief. If the Court should find, however, that it is applicable, then we contend that it is unconstitutional on its face for the following reasons:

First, that it deprives plaintiff of his property without due process of law—his property in the overtime pay that he was entitled to—and denies plaintiff equal protection of the laws.

In that regard this law affects the plaintiff differently than it would affect those who were working under contract. It would be subject to a six-year statute of limitations, whereas in this case plaintiff was subject to this 90-day statute, as far as he was concerned, and of course [23] it is claimed was accruing and it would be six months. And in that respect I also would like to just briefly state the effect of this Oregon statute.

The Court: You just made a remark that I want to repeat. You say if it was accruing it would be six months?

Mr. Etling: Yes.

The Court: Why do you think of that? It wasn't accruing?

Mr. Etling: Well, that is the language of the statute, your Honor.

The Court: Well, I know, but that is not in this case.

Mr. Etling: That is not this case, no.

The Court: No.

Mr. Etling: It is an accrued claim, was accrued at the time the statute was passed, and, therefore, if you are going to apply the statute it would have been outlawed June 10th, 1943, and that is the only phase of that statute that can be applied in this case. In the matter if this claim hadn't been filed in ten years we think it is unreasonable and unconstitutional; it is just as void as if the claim had not been filed for ten years; and certainly that statute can't be applied in such manner as to say that the accruing part of it would apply to the part that had accrued.

The Court: They indicate in the brief that it could be.

Mr. Etling: We dispute that, your Honor. And as far as the accruing part of this statute is concerned, the fact of it [24] is if a person quit working on July 1st, let us say, he would have to file immediately in the courts——

The Court: What are you talking about now—the accruing part?

Mr. Etling: Talking about the accruing part.

The Court: You don't need to talk about that, unless I change my mind about the question before me.

Mr. Etling: I see. I will submit our argument on due process on the brief. I cited a number of cases. One of the leading cases seems to be *Lamb v. Powder River Livestock Company*. That was a decision by Justice Van Devanter when he was on

the lower court. In that case of course he discusses the question of reasonableness. If the statute is reasonable it is constitutional; if it is unreasonable it is unconstitutional; and he enumerates several reasons, such as in this case if it is unreasonable it is unconstitutional for all the reasons we have mentioned here.

As to the question of reasonableness, the Court said in that leading case, "A single period cannot be fixed for all cases because what would be reasonable in one class of cases would be entirely unreasonable in another."

And there are a number of cases cited by the defendant in this matter, but the question of reasonableness will have to be determined in each individual case on the facts. [25]

Now we submit this question of discrimination against a Federal statute in violation of Article 6 of the United States Constitution. We submit that on the brief, submitting a number of cases.

Then on the question of impairment of obligations of contracts, again we have the leading case of *Lamb v. Powder River Livestock Company*, and in that case I believe a six-year statute of limitations was reduced to ninety days. In that case the Court said, regarding this point:

"But any statute which denies, unreasonably restricts, or oppressively burdens the exercise of a right of action springing from a prior contract, impairs its obligation within the prohibition of the Constitution. Article I, Section 10."

"A subsequent law of a state which denies or di-

minishes the right of the one or excuses or discharges the other from the performance of his duty impairs the obligation of the contract, although professing to act only upon the remedy.”

The Court: Your time won't permit you now to read from the cases. Just finish your points now of the argument.

Mr. Etling: All right, sir. The final point is that the Oregon statute interferes with the power of Congress to regulate commerce among the several states in a field already occupied by Congress, and we submit on our authorities that this conflict, this particular conflict had been occupied, and that the state [26] statute then in question unreasonably interfered with this normal operation of the Fair Labor Standards Act, which is based on Interstate Commerce and the production of goods for interstate commerce and, therefore, is unconstitutional.

Mr. Morris: If the Court please, without repetition, as best we can, Mr. Biggs and I have divided the field, as he, Mr. Biggs will deal primarily with the reasonableness of the statute, which to my mind is the controlling question. There are two lower court cases that should be called to your attention, one, I believe, by Judge Skipworth at Eugene, upholding this Oregon statute. We will furnish you with a copy of that decision. The other is a decision of the District Court of the United States in Iowa, in which an Iowa statute, reading that “In all cases wherein a claim of cause of action has arisen, or may arise, pursuant to the supervision of any Federal Statute wherein no period of limita-

tion is prescribed", then a six-months statute is imposed.

I want to call to your attention, however, the fact that the Iowa statute is applicable only to causes of action arising under Federal Statute and has no bearing at all on common law, state or statutory causes of action.

The Court: How old is the Iowa statute?

Mr. Morris: Passed in 1943, I believe. This case is of comparatively recent vintage. It was within the last six weeks, I believe. [27]

The Court: Well, is there a decision in the case?

Mr. Morris: There has been a decision. I have been unable to find out what the decision is.

The Court: The statute is being attacked?

Mr. Morris: The statute is being attacked. In the District Court the statute was held unconstitutional.

The Court: What?

Mr. Morris: In the District Court of Iowa the statute was held unconstitutional.

The Court: The United States District Court?

Mr. Morris: Yes, sir.

The Court: In some wage and hours claim?

Mr. Morris: Yes, sir; and the case of overtime under the Fair Labor Standards Act.

The Court: But you haven't a copy of that decision?

Mr. Morris: I have written to get a copy, and the Judge gave an oral decision and it is not reported. I wrote the attorneys asking for the basis of the opinion and this is what the attorney for the

company then said: The basis of the ruling was, or it was admitted by the legislature of the State of Iowa to place a limitation on all Federal actions.

We wrote also to the Bureau of National Affairs, which published the report of the decision, and the Bureau advised us that the judge held the Iowa Act unconstitutional because it was an attempt by the state to amend an Act of [28] Congress. Other than that we can get no information as to the basis of the decision.

The Court: Do you remember the name of the judge?

Mr. Morris: Judge Dewey.

The Court: Is the case being appealed?

Mr. Morris: I do not have that information.

The Court. All right.

Mr. Morris: The letter from the company, or the General Counsel of the company, leads me to believe that the case will not be appealed. As we look at this case, your Honor, there is only one question involved, and that is the determination of a reasonable period of time. The arguments, the various constitutional grounds that have been raised, equal protection of the laws, due process, and in all of those instances the question resolves itself around the further issue whether the statute allows a reasonable period.

The Court: Have similar statutes been enacted in recent years in other states?

Mr. Morris: My understanding is a few other states, following the lead of the Oregon Legislature, enacted similar statutes, yes.

The Court: Following the lead of Oregon?

Mr. Morris: Yes. I think the Oregon statute was one of the first, if not the first.

Plaintiff contends, first, that the Oregon statute [29] must apply only to the Fair Labor Standards Act, because there is no Oregon law giving full remedy to an employee for the recovery of overtime. We are in sharp disagreement upon that issue. There are two main Oregon statutes giving overtime to employees working in excess of either the number of hours prescribed by the legislature or by the State Wage and Hour Commission. There is one statute applicable to overtime work in mills, mines, and so on. Then there is a statute requiring the Wage and Hour Commission to fix wages and hours for working in unhealthy conditions for women and children. The constitutionality of the Oregon statute was upheld, as we all know, in the *Bunting* case. In that case in the state court, in considering a provision permitting three hours of overtime per day on condition that time and one-half be paid, the Oregon court referring to the three-hour provision said this penalty also goes to the employee in case the employer avails himself of the overtime clause. Well, we take it that is a clear reference by the Oregon court to the right of the employee to the time and one-half.

Furthermore, in *Sumpter v. St. Helens Creosoting Company*, 84 Ore. 167, which is not cited in our brief, the Court recognizes the right of an employee who has worked overtime under the statute to get time and one-half and to bring an action in his own

name. However, in that case the Court did hold that accord and satisfaction was a complete defense; [30] that the right of the individual to bring the suit was recognized.

As to the orders of the Wage and Hour Commission the Oregon Code itself carries a provision that a woman who is not paid the minimum required by the Wage and Hour Commission may maintain an action to recover the wage and to recover attorney's fees. It is our view when the Wage and Hour Commission prescribes a minimum of time and one-half for work performed after a certain number of hours, the time and one-half becomes part of the minimum wage contemplated by the statute, and then the provision of the Code permitting the action to be brought by the individual. So as a matter of fact, the Oregon law is not aimed at the Federal Statute, and there are also in existence Oregon statutes creating rights of action for overtime.

The Court: What was the case before Judge Skipworth? Was it a straight case raising the six-months question?

Mr. Morris: That case was a case brought for overtime under the Federal Act, in which the same statute was pleaded as a defense.

The Court: Was it an accruing claim?

Mr. Morris: No, sir. It had accrued prior to the enactment of the law.

The Court: He upheld the 90-day clause?

Mr. Morris: Yes, sir.

The Court: Straight up, did he? [31]

Mr. Morris: Yes, sir. The question was raised and he held in favor of the defendant.

The Court: Is that case being appealed?

Mr. Morris: I do not know. Perhaps. I assume it probably will be, but I have no first-hand knowledge it will be appealed. Mr. Riddlesbarger, however, the attorney for the defendant in that case, is here, so he perhaps knows whether it will be.

Mr. Riddlesbarger: I was told once by the attorney for the plaintiff that it would be appealed and we could rely on it, but I know the attorney and he does not say sometimes what he means, so I would not be certain.

Mr. Morris: There is a substantial amount of money involved in that case, your Honor. I think the claims aggregate in excess of \$12,000.

The Court: Who is the defendant in the case?

Mr. Morris: There were three, Watts, Lamm, and one other—perhaps some others—a copartnership. The case is Fullerton v. Lamm, Watts & Lamm, Copartners, doing business as the Deschutes Lumber Company.

The Court: Oh.

Mr. Morris: Here is a copy of the opinion in that case (passing paper to the Court).

The Court: Go ahead, Mr. Morris.

Mr. Morris: There are one or two other, what I consider minor points, raised by the plaintiff, which I will attempt to [32] dispose of before turning it over to Mr. Biggs. One contention is that equal protection of the laws clause is violated, inasmuch

as this statute relates only to a statutory cause of action rather than common law or contractual causes of action. The adoption of plaintiff's argument will settle that to a judgment in favor of the defendants, for this reason: All causes of action for overtime, both under the Fair Labor Standards Act and the state laws, are statutory, and if the statute of limitations act is susceptible to the attack of improper classification the same attack may be made upon the basic statutes upon which plaintiff relies. If the legislature has the power, either state or Federal, to pass a law creating a right for overtime, and that law be constitutional and not discriminatory, these same legislative bodies have a like power to pass a statute of limitations and it also would be subjected to the attack of limitation. The commerce argument and the Constitution, the Supreme Court of the land, may be placed in the same category. Clearly if Congress had imposed a statute of limitations for actions under the Fair Labor Standards Act two years, three years, or any period, the state law would have never had actions brought under the Federal law.

The plaintiff admits that Congress had not pre-empted the field, depriving a state of the power to enact such legislation, because in Footnote 4, on page 3 of his brief, he [33] states what we consider to be a correct statement of the law:

"No period of limitations is prescribed by the Fair Labor Standards Act for suits brought by employees under Section 16 (b) of the Act; therefore, this matter is governed by applicable, valid state law."

So the fact that a state law has been passed, which is his position here, is not an invasion by the state, either of the commerce power or the supremacy of the Federal Constitution. The question still remains, Is the law constitutional or is it unconstitutional, because of other grounds urged by the plaintiff, not because it relates to interstate commerce or because the Federal Constitution is in existence?

The Court: Well, your argument would be that whatever might be said about it as to unreasonableness pertaining to a Federal claim could likewise be said about it for unreasonableness pertaining to a claim arising under the state law. That is the point.

Mr. Morris: That is correct. But the point I was trying to make, your Honor, is, under the Rules and Decisions Act Congress has consented to the enactment of Federal laws applicable to state rights, so a conflict between the state law and the Federal Constitution is not here. The conflict would arise only if the Congress had enacted a statute of limitations but until Congress acts in that field there is no conflict.

The Court: I think you said the same thing in a different [34] way.

Mr. Morris: All right, sir. I don't intend to labor the point.

There is one further observation I would like to make, and with that I am through; and that is that the same troublesome questions arising under the Federal law also arise under the state law, and that is the determination of what is hours worked?

Who are employees? What is interstate commerce? What is inter or intrastate commerce? The difficulties of these are not confined only to Federal legislation; they are applicable to the state laws and rights under the state statutes. I don't think that Oregon has had the troublesome administration under its own laws that we have had under the Federal laws with problems there.

Mr. Biggs: If it please the Court, the question of reasonableness seems to be more or less agreed to be the crux of the lawsuit and is important, but it is also a little difficult to demonstrate because it is so essentially a question of fact and judgment as exercised under the surrounding circumstances. I think it is not disputed by anyone here that the question of the reasonableness, or, that is, that the function of determination what is a reasonable time for the running of a statute of limitations, is essentially a legislative question. The Courts have, time after time, said that it is a policy-making matter and it is not a matter that Courts should seriously concern [35] themselves with unless it can be demonstrated that the legislature in performing its function has committed palpable error, has acted capriciously or arbitrarily and in such a manner as to actually deprive an affected person of full opportunity to resort to the courts. So that the question is rather a narrow one when presented as a test to the constitutionality of an act. It is not exactly whether the Court, or the counsel, or the parties, or the administrative agency, or any other person or group of persons, might regard if it were

an open question, what would be a reasonable time. It is whether the legislature who is to be presumed to have fully considered the matter and to have wisely and fairly considered the matter, can be said as a matter of law not to have done that and to have acted unreasonably in fixing the particular period of the statute.

There are a number of cases cited in our brief, your Honor, in which the Supreme Court of the United States is on record to that effect. As I say, I think it has not seriously doubted the question in this case.

The question then that confronts your Honor is whether this particular statute of limitation which the Oregon Legislature has passed, making it applicable to the recovery of overtime or penalties accruing thereunder under any statute, Federal or state, present or prospective statute, is an unreasonable time under the circumstances. The presumption is, of course, that it is entirely reasonable. The burden is on the person [36] alleging the unconstitutionality of the Act to establish that it is unreasonable.

The argument of counsel didn't touch particularly on the question, and in his brief he has attacked it from that standpoint, solely on the basis that the complexities and the uncertainties, and the vexatious and intricate questions of law and fact which have been presented to the Courts under the Fair Labor Standards Act make it difficult for a person, an employee, to ascertain within ninety days, or six months, whichever the case may be,

whether or not in fact he is covered under the Act or whether he has a cause of action. Of course there is the well known, almost, and axiomatic rule of law applicable to that, and that is that if a person is not presumed to know the law, at least his ignorance of the law does not excuse him. It is to be presumed that he is aware of it and that his lack of compliance at least is not to be taken as an excuse for noncompliance.

The Court: Now in that connection I want to remind you, because I want you to look it up for me, of a holding probably ten years ago now by the Oregon Supreme Court about a statute that was passed by the Oregon Legislature containing an emergency clause affecting the practice question in the Oregon State Courts, and some Oregon lawyer not knowing about it, because, as we all know, our Session Laws are not published until late in the summer, or later sometimes, and not picking it up any- [37] where else he found himself in a bad position because he failed to do something within the time as required by that amended statute.

It seems to me the opinion of the Oregon Supreme Court was written by Justice Rand, who was then alive. That is the question that I wanted you mainly to discuss here, when you get around to it, the 90-day clause, because it seems to me that is all that I am dealing with, and the full time of a 90-day clause with the emergency clause attached; in other words, dating the ninety days, not after the end of the legislature but the effective date of

the Oregon statute, thus giving the public information about a chance to be appraised by the publication about what the legislature has done, and conversely denying to the public and to the profession, of necessity, from general knowledge anyhow, of what has been done by the Legislature in those cases where the emergency clause was attached.

Mr. Biggs: Yes. I am not familiar with the——

The Court: I think when you find the decision that I have in mind—when I came by I asked Judge Fee if he could guide me to it. He remembered it generally but neither one of us had a very definite recollection.

Mr. Biggs: I don't recall that, your Honor, but we will make every attempt to look up that case. I was just going to say that the practical answer to the question is this: I am [38] speaking generally now of limitation periods, not the 90-day period. If the uncertainties of the law themselves, and the necessity for new interpretations, or at least the process of looking into it, were to be considered a defense of any, or a ground for overturning the statute of limitations, there never would be any opportunity to set up a statute of limitations, because the law itself in many fields is uncertain and continues to be until it is adjudicated. That is true of this Act. If you say wait until the Act has been completely adjudicated and all the problems solved before a man is required to sue under it, that time might never come. I make that only as an argument now and I say, in answer

solely to the assertion of counsel, the position of counsel, that it is unreasonable because of its application to the Fair Labor Standards Act and because of the uncertainties and complexities of the Fair Labor Standards Act.

Our position is pretty well developed in our brief on that, your Honor, and we have developed two reasons which we think might well have motivated the legislature in classifying legislation of this type for a special statute of limitations in determining the proper period to be the periods adopted.

Now as to the 90-day limitation, and particularly with reference to what counsel has had to say about that, he has based, as I say, his whole case on the fact it is difficult [39] to know what your rights are under the Fair Labor Standards Act, and, therefore, as to that Act the statute is not applicable, or is unconstitutional. The fact of the matter is the Act has been in effect about four and a half years before the Oregon statute was passed. The men knew pretty well by that time, and certainly this plaintiff, that by admission in the pre-trial order, whether he had a claim or didn't have a claim, whether it was going to be paid or was not going to be paid, whether there was a controversy about it, so there was no necessity for all the investigation for uncertainties counsel speaks about in this case.

It is true when the statute was passed the saving clause of ninety days was provided, and the emergency clause put the Act immediately into effect, so the ninety days started running in March, 1943.

The question then is, whether ninety days afforded adequate opportunity, or a reasonable opportunity, to employees affected by the Act to resort to the courts for the purpose of determining their claim.

The Court: Without publication?

Mr. Biggs: Yes, without publication, your Honor. As to that I don't know exactly when the session laws were published but it was probably in June or July. We can't know precisely what information employees had but we do know this—and I think the Court almost could take judicial notice of the fact that the unions were present at the legislature and were advised [40] of what was being done—these bills were rather widely circulated, even before they were published in volume form. The Wage and Hour Administration through its representatives of course, no doubt, was keeping very close tab on the progress of the bill. The newspapers undoubtedly carried some reference to it. Customarily they do publish the bills even before they are passed.

The Court: I never heard of it myself until the case was referred to me the other day.

Mr. Biggs: I appreciate that, and the plaintiff in this case has said that, too. I believe that he doesn't know, and his attorneys has, so we will have to argue the matter, I suppose, from general principles and not as to how it applies to the particular plaintiff in this case.

The Court: Now you may tell me something more about that. Was this a controverted measure?

Mr. Biggs: I understood there were hearings on it. Could you answer that question?

Mr. Davies: Yes.

Mr. Biggs: Mr. Davies probably is more familiar with it than I am.

Mr. Davies: The matter was controverted in the legislature, and there were discussions pro and con. I don't remember the vote but there was a substantial vote on both sides.

The Court: Was it one of the high-lighted controversial [41] measures at that session?

Mr. Davies: I question whether I should say that, your Honor.

The Court: Who was the author of the bill, do you remember?

Mr. Davies: I am sorry, I don't remember that. We can easily supply that but I don't remember it.

The Court: All right.

Mr. Davies: I might say in this connection, for your Honor's information——

The Court: Was the vote close?

Mr. Davies: Not terrifically close. It seems to me in one house it was not close at all, and in the other house it was somewhat closer.

The Court: Were there large public meetings about it?

Mr. Davies: My information is that there was at least one public hearing, but I don't want to be precise about that because I haven't thought of that just recently.

The Court: And of course, let us say, the em-

emergency clause takes away the veto power, doesn't it, now? No, no, the veto power is not affected. Was this bill filed or approved by the Governor, does anybody happen to know?

Mr. Davies: It was approved by the Governor, and I might say in connection with this line of discussion, that the point was raised at the argument of the case before Judge Skipworth, by the attorney for the plaintiff, that he had only received [42] his copy of the 1943 Session Laws within I think a week or ten days before the Act became effective, and that he had had no knowledge of it, and that matter was fully discussed and argued before Judge Skipworth, and it was pointed out there, as Mr. Biggs has contended here, that the information was widely disseminated, and the mere fact it had not gotten to the attention of the particular plaintiff was not controlling.

The Court: You will find, I am sure, a good discussion of the dangers of legislative practice in the Rand decision—of the dangers of legislative practice of attaching emergency clauses to subjects affecting a whole lot of people.

Mr. Davies: For your information again, your Honor, I think you might know that in this very court there were filed a substantial number of cases within the ten-day period before the ninety days ran under this act, showing that the matter was widely known and they were filed also in other courts but there were a number of them in this very court, so that the information did get around very generally.

The Court: Now I must be excused for fifteen minutes and I will want to hear you further; and then you will get the same time.

Mr. Biggs: May we have a recess here?

The Court: Yes, for fifteen minutes. Before we recess, do you want to stand on your claim there about page 40 of your brief, that there is more than the 90-day clause involved in [43] this?

Mr. Biggs: Yes, your Honor, we think there is, and I will just briefly outline our position on that.

The Court: Yes.

Mr. Biggs: Our position on that is that, even though the 90-day limitation should be determined to be unconstitutional, the entire Act does not, as a result of that, fall. The plaintiff then would have a reasonable time within which to file his claim and the six months' limitation, if it is reasonable, is the time that would control, and we rely upon the case of *Koshkonong v. Burton*, in the United States Supreme Court, that is cited in our brief.

The Court: I have trouble in following that argument.

Mr. Biggs: All right. Perhaps I haven't stated my position clearly. Where the savings clause itself might be considered to be unreasonably short, that is the 90-day clause in this case——

The Court: Of course, your statute has special phrasing in it. It says—read it again.

Mr. Biggs: "Recovery for overtime or premium pay accrued or accruing, including penalties thereunder, required or authorized by any statute shall

be limited to such pay or penalties for work performed within six months immediately preceding the institution of any action or suit in any court for the recovery thereof; provided, that an action may be [44] maintained within a period of ninety days after the effective date of this Act on claims heretofore accrued.”

The Court: Now then, just obliterate that proviso.

Mr. Biggs: All right.

The Court: The statute then says—ready it now, without that.

Mr. Biggs: The statute then says “Recovery for overtime or premium pay accrued or accruing, including penalties thereunder”——

The Court: Accrued or accruing?

Mr. Biggs: Yes.

The Court: Your argument then is——

Mr. Biggs: That it had accrued.

The Court: That it had accrued and he had six months?

Mr. Biggs: Yes.

The Court: If the 90-day clause fails?

Mr. Biggs: That is right, your Honor; if the 90-day clause fails. And that is my position in the matter, your Honor. I think that the Koshkonong case fairly construed stands for that principle. That was a case involving the right to sue on certain bond coupons. The period of time was very much longer, but when the application was first made——

The Court: That would be a pretty important

point to me, because I don't look with favor on it, with this midnight resolution, the way of doing business in the legislature, of [45] passing things in the way I classify this, in my own mind, about that emergency clause and the 90-day clause.

Mr. Biggs: During the recess, if the Court will permit me, we will see if we can run this down. Then we will get that Koshkonong case, too, because your Honor will want to run that down.

The Court: It is very important to me.

Mr. Biggs: Yes, your Honor.

The Court: All right. We will be back in fifteen minutes. We will continue the argument at the noon hour, I guess, rather than come back this afternoon. Is that agreeable?

Mr. Biggs: It will be fine with me, yes.

The Court: All right.

(Short recess.)

The Court: All right. Proceed.

Mr. Biggs: We were not able to find perhaps the case the Court had in mind. The case of *Simpson v. Winegar* involved a question similar to that. We didn't find any condemnatory language in the case. It refers to an option by Justice Rand. This opinion was rendered by Justice Burnett.

The Court: Oh, no. I am not thinking of anything that far back.

Mr. Biggs: 1927 is the date of it. It is more recent than that. We haven't had time then to run it down completely, your Honor. [46]

The Court: What is the one you have there?

Mr. Biggs: *Simpson v. Winegar*, 258 Pac. 562.

The Court: All right.

Mr. Biggs: The case I called your Honor's attention to just before recess was the case of *Koshkonong v. Burton*, 104 U.S. 668, opinion by Justice Harland. In that case certain municipal bonds were issued in 1857, I believe. At that time the statute of limitations applicable was twenty years, both as to the bonds and the coupons. Subsequently, after the time had run for about fifteen years, in 1872, I believe it was, a new statute was passed, applying only to the coupons of the bonds and providing that no cause of action might be commenced thereon later than six years after the coupons had matured. Then there was a savings clause of one year, except as to those that had matured prior to that time. Since the coupons started maturing yearly a lot of them, in 1872, were matured. They had never been clipped from the bonds and no action ever brought on them, but the Court in the *Koshkonong* case determined that the obligation had accrued one year after the bonds were issued as to certain of the coupons and certain more the following year, and so on, so that in 1872, as to a considerable number of bonds the new statute would have run except for the saving clause of one year, and it was urged that saving clause of one year was an unreasonably short time within which to save rights and to bring actions on pending obliga- [47] tions.

The Court held, however, that it was not necessary to consider that question, whether it was too

short or not too short, and expressed no opinion on it. In view of the fact that the action was not brought until 1878, which was six years after the—eight years after the—no; 1880 was when the action was brought, which was eight years after the new statute had gone into effect, and said:

“We don’t have to determine whether the savings clause is valid or not, because the time otherwise allowed as to coupons accruing after the new statute had gone into effect was six years, and since the plaintiff didn’t bring his action within that six years’ time, he is out in any event. That certainly is a reasonable time and we will adopt it as a reasonable time to determine. Even if we should hold the one year saving clause inapplicable, he still had proceeded within a reasonable time to bring his action.”

And I think that case properly construed, or fairly construed, at least, stands for the proposition that if the savings clause is determined to be too short a time, then the time provided as to actions subsequently accruing by the new statute would be applicable by analogy. Therefore, reasoning from that case in this case, if the Court should determine that the 90-day limitation period was not a reasonable length of time, and, therefore, unconstitutional, it would be for the [48] Court, as we see it, to pass on the constitutionality of the six-month period, and if that is determined to be constitutional then it would be applicable to this cause of action and it would be barred, because the action wasn’t actually commenced until—more than what?

Mr. Etling: More than a year.

Mr. Biggs: More than a year after the new statute had gone into effect?

Mr. Etling: No. It was eleven months.

Mr. Biggs: Eleven month, was it?

Mr. Etling: Yes.

Mr. Biggs: Eleven months before it was accrued; at least after the six-months period. That is one case we haven't found directly on that point. The language in a number of cases is, your Honor, if the savings clause is an unreasonably short length of time and no adequate provision has been made to save existing rights, then the person affected by it, whose rights have been cut off, will have a reasonable time thereafter to bring the action, and the Koshkonong case says that the time provided by the legislature as to the cause of action and their accruing is the test to be used. In that case then it would be the six-months period here.

There are annotations other than cases cited in our brief on the question of reasonableness of time, passing on statutes of varying length of time from thirty days to several [49] years. 49 A.L.R. 263, 120 A.L.R. 758. That is a good convenient collection of cases, as are most of those that we rely on.

I don't know what more can be submitted to your Honor, except as to the factors that might have been in the mind of the legislature and which probably controlled the legislature in adopting these periods of time.

Probably it is true, your Honor, that the administration of the Fair Labor Standards Act had

pointed the public's attention and the Legislature's attention to the justice, and frequently very grievous burdens that were imposed upon employers who suddenly were confronted with actions for overtime and penalty, or at least double overtime, where it was never anticipated either by the employer or the employee while the work was being performed, and then perhaps sometime afterward, and may have resulted from an interpretation of the Administrator of the Wage and Hour Division who, in making the interpretation, never realized that the particular situation had always been in the realm of uncertainty and not known either to the employer or employee. He himself may have delayed in passing upon the question until a great deal of time had passed and considerable obligations might have accrued under it. Then in making the determination the Administrator, recognizing that fact, would not make it retroactive but would make his interpretation simply prospective. Of course his conclusion on the matter [50] or his decision not to make the situation retroactive, would not cut off or bar any claims that any employees might want to assert under it, using the Administrator's interpretation as a persuasive factor in saying that the particular coverage contended for or the particular interpretation of the Act applied to that.

The Court: Do any of you know what is in the air throughout the country about the odd year Legislature coming in this January? Most legislatures, I think, like ours, meet in the odd years.

Mr. Biggs: No, I do not, your Honor. You mean on this particular question?

The Court: Whether legislation——

Mr. Biggs: Is contemplated?

The Court: —is being offered?

Mr. Morris: I know of one state, your Honor, on the Coast, or in this area, where of course the Legislature has not convened yet but statutes similar to these are in construction. We have been asked for a copy of the Oregon statute in certain instances.

The Court: Do you know whether there are many statutes like the Iowa one, fixing the statute of limitations for claims under a Federal Statute?

Mr. Morris: I was unable to find any.

Mr. Biggs: That would appear to be a clear ground of [51] distinction between the two statutes, the Oregon statute and the Iowa statute, then, since that applies solely to Federal Statutes. The Legislature, of course, is fixing the particular time here involved, were cognizant of the fact that in this state there are already many other statutes of limitations even than ninety days or sixty days, on lien foreclosures—some lien foreclosures as short a time as thirty days.

The Court: You are fictionizing now—bright lawyers have to—on what the Legislature might have thought of, had it thought.

Mr. Biggs: That is about the only way we can present the matter to your Honor. I think the Courts have sometimes invited us to do that.

The Court: Oh, yes.

Mr. Biggs: Because they said that if there is any fact that could have existed——

The Court: I know what the racket is—exceeding the legislative intent——

Mr. Biggs: That is right, your Honor.

The Court: —when no intent existed.

Mr. Biggs: There are those factors, though, and we have set them out pretty fully in our brief, that might influence, and indirectly did influence, the Legislature.

Mr. Biggs: There is another feature that might seem important under decisions of the Court. There is no way of [52] amicably adjusting controversies under this Act; that is, any binding enforceable way of enforcing the ordinary compromise or adjustment, is not binding on the parties, because they say the liability is fixed by the statute and neither the employee nor employer has the right to give it away, which is of course true under the Oregon statutes.

The Court: You mean settlements?

Mr. Biggs: Settlements; yes, your Honor. This kind of a situation arises——

The Court: I know about them. I know about the Federal. I don't know about any others. You say settlements are possible under the Oregon law?

Mr. Biggs: No. I think they contend they are not.

Mr. Morris: There are situations under the Oregon law, your Honor. Under the ten-hour law involving what the United States Supreme Court have held, accord and satisfaction is a bar, which

of course permits contractual settlement. Under the Wage and Hour Law, where the Commission fixes rules and fixes overtime, the statute provides the parties cannot contract away their rights.

Mr. Biggs: So it has arisen much more frequently under the Federal than under the Oregon statute, but it puts the parties at considerable disadvantage and indicates a sound public policy behind a short statute of limitation, behind a suitor who has in mind forcing the claimant to bring his action before too much time has gone by. There is no other way of disposing of it. An employee and employer cannot agree upon any matter in litigation. Nothing is gained by attempting to through the Wages and Hours Commisison, or attempting to compromise or effect a settlement themselves; so through the courts is the only way to get adjudication that is finally determined. Therefore, it is considered to be some public policy to promote the necessity for prompt action if litigation is contemplated.

The Court: Talking about legislative intent, what was said in Congress when the Wages and Hours Law was enacted as to why they didn't provide for a uniform statute of limitations? Anything?

Mr. Biggs: I don't know that anything was said then. My attention has not been called to that. Has yours?

Mr. Morris: No.

Mr. Biggs: I think that the matter wasn't even discussed. It is perfectly competent for Congress

at any time to do it, if they had in mind they wanted to do it, but I don't believe that question was discussed. I have already discussed the distinction between this kind of a case and a case arising under the Railroad Adjustment Act. I think the distinctions are clear. The Federal Employers' Liability Act of course has a statute of limitations.

The Court: It might not be a bad idea just to run over [54] our state statute of limitations generally. Direct claims, which are our main source of litigation, are two years, aren't they?

Mr. Biggs: Six years, as I remember.

The Court. And the catchall clause is one year, isn't it?

Mr. Biggs: I don't know that I know exactly what you mean by that.

The Court: A situation not provided for in this statute shall be one year.

Mr. Biggs: Ten years.

The Court: Ten years?

Mr. Morris: Yes.

Mr. Etling: I might mention in that regard, your Honor, the statute on penalties is three years, although this is not considered a penalty in this case, but a penalty is three years.

Mr. Biggs: That is, statutory penalties——

Mr. Etling: Yes.

Mr. Biggs: ——forfeitures, and so on? Then there are other periods of time. The period of time about real property is ten years; actions on ordinary contracts, express or implied, are six years; special

statutes relating to actions against sheriffs or public officials—what is that, one year?

Mr. Etling: Three.

Mr. Biggs: Is that three years? [55]

Mr. Etling: Yes, I think it is.

Mr. Biggs: Three years, and then special statutes in numerous instances relating to lien foreclosures, to suits to test the validity of certain elections, and so on, as short as thirty days. So that it is pretty hard to determine any public policy as to any particular period of time. That is, there is no way of averaging them up at all, or attaching any particular significance to any one or the other of them, except to say that the legislature, for reasons which appeared sufficient to them if they at the time determined as to this particular type of actions a particular time should be allowed, and this is what apparently they did do in this instance.

I haven't any other cases to call to your Honor's attention directly on the point that the Court suggested; that is, as to the situation if the statute of limitations—if the savings cause should be held unreasonable, except the Koshkonong case, and that would seem to throw it under the six-months period.

Mr. Davies: Could I say just a word? Since your Honor has indicated an interest in the legislative history, we will go back and refer to the calendar and give you the case. Mr. Riddlesbarger has called to my attention the fact that there was a move to reconsider this bill in—was it the Senate or the House, do you know?

(Mr. Riddlesbarger here consulted with Mr. Davies [56] in an undertone.)

Mr. Davies: In one of the houses, and it was reconsidered, and while the vote was somewhat closer than it was earlier, I mean while it was voted upon for reconsideration the vote was a little bit closer than it had been on the original passage. It was passed by a substantial majority in both houses. As I say, we will supply you with that in a supplemental statement. And on this matter of the——

The Court: I wonder why the emergency clause?

Mr. Davies: On that very point I was going to say——

The Court: To defeat a referendum, probably?

Mr. Davies: Possibly. I just don't know, but I remember that matter was discussed. I listened to the argument in the case before Judge Skipworth and I made a short argument there as a friend of the Court, and Mr. Riddlesbarger and Judge Harris handled the case, and he and I have been discussing a point which Judge Harris made there, which I will want to pursue a little further and attempt to locate the cases on which he relied, but I recall his stating to the Court, and him reading certain cases where there had been no savings clause, no emergency clause, and the Court had pointed out where you had no savings clause the period of time between the passage of the statute and the time that it became effective served some purpose, and he was thinking of the same point that is in your Honor's mind, I believe, and here

there was [57] a savings clause put in, I think in the circumstances, a good deal more reasonable time than might appear to your Honor at first blush. I think we have to bear in mind that when we are dealing with wage claims we are not dealing with a subject upon which a plaintiff is justified in sleeping on his rights. After all, a man gets his pay check every week, every two weeks or every month. There is outlined on it the basis of his compensation, and if there is any substantial basis on which he is entitled to more money the matter is called forcibly to his attention at that time, and I think there was a feeling as to any accrued claims. Certainly in weighing the possible difficulty to one future possible plaintiff, and the harassment of innumerable employers, it might well have weighed with the Legislature to say, "We think those people who have claims should bring them forward and get them settled," and certainly the matter was widely disseminated because I defended some of the cases that were brought before the statute ran.

The Court: Well, there is so much emphasis in the field of Oregon political affairs put on publicity and information to the voters, our voters' pamphlet; the fact that we have the initiative and referendum, which many states don't have; arguments may be made on the way they can be gotten out to the voters on initiative and referendum measures; but I don't think the average judge would like—I know Judge Rand didn't [58] like it when he came up against the facts. I am awfully sorry I can't be more definite about that case.

Mr. Davies: This wasn't a matter—I don't mean to split hairs with your Honor.

The Court: No.

Mr. Davies: But the statute actually became effective, I would say, a week or ten days after the Session Laws had been distributed. Now I grant that is not a long time but they actually were distributed a week or ten days before the 10th of June.

The Court: This emergency clause came along in March.

Mr. Davies: You say the savings clause?

The Court: I mean the savings clause.

Mr. Davies: Yes. The savings clause expired in June and a week or ten days before that the Session Laws had come out. I mention that because Mr. Lombard, the attorney for the plaintiff in the case before Judge Skipworth, said, "I have checked up the time I received my Session Laws and as near as I can tell it was not over a week or ten days before the bar let down"; and while that is not as long as three months, or a year, it actually was in the hands of the public that length of time, and the information about it in this instance was quite widely disseminated.

The Court: So that is the element of reasonableness that I am going to ponder over, that I am interested in—the [59] reasonableness of legislating that way.

Mr. Etling: If the Court please, there are just a few matters I would like to discuss. One, checking the House and Senate Journals on this matter,

I believe that they will show that this law was passed within a period of about two days and at the end of the legislative assembly in 1943.

The Court: That is when all the hot stuff goes through, if you have been around there, Mr. Etling.

Mr. Etling: No, I haven't.

The Court: Well, you stay away, if you possibly can.

Mr. Etling: And I have checked to some extent in the newspapers and I am unable to find particular publicity given this. I found one short article, about a half inch; I believe it was in the Oregonian; and also checking the minutes of the House and the Senate, I believe—checking the Journal, I believe, no minutes were taken on this particular bill. I don't know who sponsored the bill, do you?

Mr. Davies: I just don't know. We will supply that to your Honor, but just who introduced it I don't remember now.

The Court: I can make a good guess, but I won't.

Mr. Etling: Other than that, on the Fullerton case, which was decided before Judge Skipworth, I would like to point out that the Constitutional question was presented. However, the applicability was not presented. And then as far as this language of the Oregon statute is concerned, I believe that [60] the very language precludes the expression which Mr. Biggs contends for, that we are forced to rely on the six months' period. I believe the very language of the statute refutes that.

The Court: Well, you might speak a little more fully about that. The opening sentence of the Act says "accrued and accruing".

Mr. Etling: Yes, but going on and reading further, your Honor, "Recovery for overtime or premium pay accrued or accruing, including penalty thereunder, required or authorized by any statute shall be limited to such pay or penalties for work performed within six months immediately preceding the institution of any action or suit in any court for the recovery thereof; provided, that an action may be maintained within a period of ninety days after the effective date of this Act on claims heretofore accrued." We believe that precludes any such construction.

The Court: Yes, but he says cross that out, obliterate it, and find it unconstitutional. Then he says the rest of the statute still leaves a provision as to an accrued claim.

Mr. Etling: We deny that. Of course we have attacked the six-months statute also.

The Court: I understand. What do you deny? You say you deny that. It says "accrued and accruing".

Mr. Etling: I mean we deny that the six-months statute [61] can be——

The Court: How do you get away from "accrued and accruing", used in the body of the statute?

Mr. Etling: Well, I believe that the specific language at the last would control.

The Court: Well, what you mean is, you think

the Legislature, in passing the Act, thought that it would be accrued claims only in the last clause?

Mr. Etling: Yes.

The Court: But they are saying that to save the Act and—well, that is hardly correct.

Mr. Etling: I follow, your Honor.

The Court: No, you don't, because I got lost myself. There is no question about saving the Act, you said, and Mr. Davies just wants me to give weight to that word "accrued" in the body there.

Mr. Davies: That is correct, your Honor.

The Court: No question of saving the Act. If I struck down the 90-day clause you simply would not touch the six-months question.

Mr. Davies: That is correct, your Honor.

The Court: So I was in error when I started to say there was some question of saving the Act involved in order to get that construction. What you are asking me is to come with it to the word "accrued" in the body of the Act. [62]

Mr. Davies: And to apply the six-months limitation if the ninety days does not apply.

The Court: Yes, which means this: That every man who had an accrued claim had not only ninety days, he had six months. That is what your argument leads to. To give it to this man you would have to give it to everybody else.

Mr. Davies: That may be true, but if your Honor will read the Koshkonong case, to which we have referred in our brief, the point is the Koshkonong case says if your period of savings clause is unreasonably short, then as far as saving any

cause of action is concerned, he is limited to a reasonable time. Fairly considered, I think that is what the case means.

The Court: Even though nothing further had been said about saving existing causes of action other than——

Mr. Davies: Then you would be limited to a reasonable time, and to decide the reasonable time in that case would be the time fixed by the remainder of the statute, and by that process, as well as by the process of accrued and accruing I think you would arrive at the conclusion that six months would be controlling if the ninety days were stricken.

The Court: You don't mind these interruptions, do you, Mr. Etling?

Mr. Etling: No. That is quite all right. Finally, the defendant, in fixing——

The Court: I think there is a fallacy in your argument [63] but I can't find it right now, Mr. Etling. Don't sit down. You had better say what you think up, too, after you leave here.

Mr. Etling: I just felt that this accrued or accruing was sort of explanatory rather than of the whole Act. I don't see how you can take part of it away and make the rest hold. But I was going to finally say the defendant has finally, in their argument, invoked the rather vague presumption of constitutionality. We haven't said anything about that. We didn't have a chance to say anything about it in our opening brief, and we didn't file any reply on that point. I rather dispute that there is such a presumption and would like to state

these cases; *U. S. v. Carolene Products Company*, 304 U. S. 144, and *Dartmouth v. Woodward*, 4 Wheaton 518, at 581 and 582; and those cases seem to hold that where specific Constitutional provisions come in conflict with this presumption it vanishes. However, I will say that if there is such a presumption we feel it is inconsequential. We feel we have overcome it.

The Court: Where do you get on a question like this: If six months is too short, what is the dead line, nine months, a year, eighteen months, two years?

Mr. Etling: The regular statute of limitations in this case we contend is six years.

The Court: I know that, but would you challenge a two-year [64] statute?

Mr. Etling: Well, I really haven't considered that.

The Court: You might as well. I am going to have to consider it and you might as well consider it. We are all in this together.

Mr. Etling: Perhaps a two-year statute would be——

The Court: Well, what is our guide?

Mr. Etling: I think we have contended to a considerable extent that ample time should be given to permit the Wage and Hour Division to make their investigations in this matter. Otherwise we feel that one of the most important functions of the Fair Labor Standards Act is frustrated.

The Court: They say in their argument that is administrative practice but should not be given

the weight you claim for it. They say in their brief as to that, that puts the state's policy as to limitations into the hands of an administrative body that could be inefficient and either understaffed or overstaffed and never get its work done, like the Interstate Commerce Commission is at the present time about bus and truck matters. Some things don't come to a certain head for several years.

Mr. Etling: Well, I do have this to say: That I think if the defendants want to fight the case out on those grounds, I think their battle is in Congress, not with the state legislature. [65]

The Court: Now in that connection the modern view, I believe, if I may put it that way, is that Federal Judges should be very slow to hold legislation unconstitutional. As soon as an unconstitutional question arises affecting Federal legislation we are supposed to call in two other judges and only three judges may sit. I think that is one of the modern statutes that has been passed to curb the United States District Judges.

Mr. Biggs: That is in injunction proceedings, your Honor?

The Court: Oh, I guess so. But certainly the modern tendency includes state legislation. We are under an unwritten, if not a written, mandate to be slow to interfere with the states in the development of their local policies, and I would be very slow to set aside a state limitation—a limitation statute. I generalize there. I haven't referred to this statute. I would be very slow to set aside a

limitation statute passed by a state. It would be so simple a matter if Congress felt that the execution of an important Federal measure were being hampered, it would be so simple a matter for them to pass something like this: That wherever a lesser limitation is provided by any state law of limitation the plaintiff under this Act shall be as provided here, and if a lot of other ideas get rambunctious this coming January, February and March, and pass a six months' statute, or shorter, that was thought to be trespassing on Federal people, Congress [66] overnight could wipe all of those out. It is a pretty serious matter. I am in accord with the modern trend of the courts, practicing severe self-restraint, very severe self-restraint in holding legislation unconstitutional, state as well as Federal, and I think it would be a serious matter to set aside—I don't say I might not do so; it would be a serious matter for me to set aside this six months' statute.

Mr. Etling: The Court is put in the position, as I see it, of either holding the state statute unconstitutional or else nullifying a Federal statute—nullifying a part of a Federal statute that functions, —

The Court: Well, no——

Mr. Etling: —because it is our contention all the way through here that this statute is so short that it strikes at the right rather than the remedy.

The Court: In that statement I might argue with you, too, Mr. Etling. You and I get along too well. You let me have my way part of the

time. A lot of the others don't. I think that is why we get along so well. But in that remark you haven't given any weight to Congressional power to deal with this subject itself.

Mr. Etling: That is true.

The Court: If it sees fit at any time. There are one or two questions before we close I want to bring up. This six months' statute, in effect, so far as publication is concerned, [67] is just a three-month statute, so far as publication is concerned? These laws were published in June.

Mr. Biggs: I guess that is about it. You are speaking about when the Session Laws came out?

The Court: That is right.

Mr. Biggs: That would be just about three months, yes.

The Court: Now the second thing is the one I just touched on a minute ago. I never can remember from time to time—in fact, I don't want to trust to my memory—as to whether there is a Federal statute about how we should approach a claim of unconstitutionality of a state statute. Is that one of those inhibited fields, or not?

Mr. Morris: I think it is a view of the Court rather than statutory, your Honor.

The Court: Well, we have several statutes, you know, that have been passed——

Mr. Morris: We will check it.

The Court: ——that have been passed about that, and I want to be dead sure that I could not sit here, and sit alone, about the validity of an order of the Oregon Public Service Commission.

That I know. Now that is that statute, or some related statute, that covers state legislation. I want to be sure about that.

Mr. Morris: We will check up on that.

The Court: Anything more? There is no hurry. All right. [68] I won't do anything right away. It will give you time to send me up anything you want to, by letter or otherwise.

Mr. Davies: All right. Thank you very much.

The Court: So we will adjourn until half past nine in the morning.

(Thereupon, at 12:34 o'clock P. M., Court was adjourned.) [69]

Friday, December 8, 1944, at 10:42 o'clock A.M., the following further argument was had herein:

The Court: All right.

Mr. Biggs: As I understand, the Court requested some authority relating to the jurisdiction of a single Judge to pass on the constitutionality of a state statute having reference particularly to this case, where no injunction is sought and the question arises only in connection with the defendant's plea of the statute as a bar to the institution of the action.

The section which the Court probably has in mind is Title 28, Section 380, U.S.C.A., which provides that no interlocutory injunction may be issued by a single Judge restraining the enforcement of a state statute on the grounds that it is unconstitu-

tional. That is the gist of the section, and there are some other sections of the Code requiring the finding of a three-Judge court in addition to that but which I think are not applicable here. Those relate to the restraining of an order of the Interstate Commerce Commission, or restraining the enforcement of acts of Congress on the ground that they are unconstitutional, or any actions where the Attorney General files certificates of importance, that is certificates alleging that matters of large public importance are involved in suits between private litigants and, in effect, the Government, an intervening party. [70]

The only one bearing, I think, closely on this section, your Honor, is Section 380, where the constitutionality of the state statute is asserted as to grounds for the application for an injunction.

The United States, or Ex Parte Bransford, 310 U. S. 354, 362, and 84 Law Ed. 1249, this matter was discussed by the Supreme Court of the United States, Justice Reed writing the opinion. In that action, or in that matter a petition was filed for a mandamus to compel a single Judge to convene a 3-Judge Court for the purpose of passing on the validity of certain tax assessments, and so on, in a state. The petition was denied on the ground that there was no application for interlocutory injunction. The Court said this:

“There is no indication that Congress sought by Section 266 to have every attack on the constitutionality of a state statute determined by a 3-Judge Court. It sought such a bench only to avoid preci-

pitate determinations on constitutionality on motions for interlocutory injunctions. As the foregoing ground adequately disposes of the petition for mandamus, we do not discuss other reasons for refusal urged by the bank.”

Then in the case of Oklahoma Gas & Electric Company v. Oklahoma Packing Company, reported in 292 U. S. 386, 78 Law Ed. 1312, the Court said this:

“The procedure prescribed by Section 266 may be [71] invoked only if the suit is one to restrain the action of state officers”, citing a number of cases. “That this condition is vital is sufficiently indicated by reference to the part played by *Ex Parte Young*, 209 U.S. 123, in inducing enactment of the section. Hence the cause of action alleged against Wilson & Company, although within the jurisdiction of the District Court, is subject to this extraordinary procedure, and appealable directly to this Court, if at all only because it is incidental to the relief prayed against the state officers. Whether it is so incidentally we need not inquire, for we conclude that the case against the state officers was not one within the appellate jurisdiction conferred upon this Court by Section 266 so as to bring either that case or its incidents before us for decision.”

There is an annotation on this question, if the Court please, in 83 Law Ed. 1193. I just ran across that annotation before your Honor took the bench and I haven't—

The Court: Nine hundred and what?

Mr. Biggs: It is 1193, rather an exhaustive annotation. I haven't had a chance to go through it myself. Whether the Court wants to take time for me to read a part of it—it is rather long:

“The scope of the present annotation is, as the title suggests, confined to a consideration of the circumstances rendering necessary or proper a 3-Judge Federal District [72] Court. It is not concerned with procedural requirements as to notice of hearings”, and so on.

“Provisions for hearings before three Judges in the Federal District Courts are found in three separate statutes, to-wit, the Act of June 18, 1910 (Judicial Code, Section 266, 28 U.S.C.A. 380);” that is the one that we are referring to; “the Act of August 24th, 1937 (28 U.S.C.A. 380a);” that is a similar provision relating to the restraining of enforcement, the enforcement of a Federal Act instead of a state statute; “and the Act of October 22, 1913 (28 U.S.C.A., Section 47).”

Those are suits restraining the enforcement of orders of the Interstate Commerce Commisison. Those three are referred to here in this annotation.

The Court: See what the summary says.

Mr. Biggs: Yes. I was just looking for it. I will read it generally:

“The Act of June 18, 1910 (Judicial Code, Section 266, 28 U.S.C.A., Section 380) as first enacted provided that, ‘no interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a state by restraining the action of any officer of such state in the en-

forcement or execution of such statute shall be issued or granted by any Justice of the Supreme Court, or by any District Court of the United States, or by any Judge thereof, or by any Circuit Judge acting as District Judge, upon the ground of the [73] unconstitutionality of such statute, unless the application for the same shall be presented to a Justice of the Supreme Court of the United States, or to a Circuit or District Judge, and shall be heard and determined by three judges, of whom at least one shall be a Justice of the Supreme Court or a Circuit Judge, and the other two may be either Circuit or District Judges, and unless a majority of said three Judges shall concur in granting such application."

That is the statute.

"In 1913 the statute was amended by adding the words 'or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such states', and in 1925 the statute was further amended by extending the requirement for three Judges 'to the final hearing in such suits in the District Court'. Provision is also made in the statute for the granting of a temporary restraining order, pending the hearing of the application for the interlocutory injunction, by a single Judge, in the event an apparent irreparable damage from delay.

"The statute, which is purely procedural, was designed to remedy defects in the existing law which permitted single Judges to suspend the oper-

ation of state statutes, often without the exercise of sufficient caution and circumspection. The scope and purpose are concisely set forth in *Connecticut Gas Company v. Imes* (1926; District Court) 11 Fed. (2d) 191, [74] wherein it was said: 'The mischief at which Section 266 is directed was well understood at the time of its passage. It was the tying up of the operation of an act of a State Legislature, or of an order of the State Commission' "—

The Court: What is the Summary, to begin with?

Mr. Biggs: I am reading the Summary now, your Honor. It is just discussing generally what this is, unless maybe we have got a conclusion over here (Counsel turning pages).

The Court: Was the statute passed in 1910?

Mr. Biggs: Yes, your Honor, 1910 and subsequently amended. It is about three or four pages discussing the cases and I think it refers to fees. The case that I cited, your Honor, is the one directly in point, holding that it is not necessary unless——

The Court: Let's have Mr. Mundorff look it over while we are talking about other things.

Mr. Biggs: Yes.

The Court: If he thinks there is something in there that ought to be called to our attention he can.

Mr. Biggs: Yes.

(Mr. Biggs here conversed with Mr. Mundorff in an undertone.)

The Court: Of course it is within the recollection of all of us that in this court the constitution-

ality of the Oregon School Law was passed on I think by a single Judge, whether [75] Judge Wolverton or Judge Bean I don't remember, and how the question arose I think you remember. That was ten or fifteen years after the enactment of the statute, because it was in the '20's.

Mr. Biggs: In Ohlinger's Federal Practice, your Honor, this is said as to what conditions are necessary to being a 3-Judge Court, at page 946:

"The Supreme Court has said that the statute is designed for a special class of cases which is sharply defined: Oklahoma Gas & Electric Company", citing a number of these cases; "also that 'the requirement of the statute has regard to substance and not form' and should be construed and applied to effect the purpose of its enactment.

"Four circumstances must co-exist to require the calling of additional Judges: (1) An application for an interlocutory injunction must be prayed and pressed; (2) The interlocutory injunction sought must be directed against what is, or purports to be, the enforcement of a state statute, or of an order of a state administrative board; (3) The interlocutory injunction sought must be one which would restrain the action of a state officer; (4) The ground, or one of the grounds, on which the application for the interlocutory injunction is made and pressed, must be that the statute, order or acts complained of, violate the Constitution of the United States." [76]

This section applies, whether the interlocutory injunction is prayed and pressed by motion in an in-

dependent suit or in a dependent bill in a receivership.

Someplace else I noticed the syllabus to the effect where the constitutionality is alleged, that it violates the Constitution of the state and not of the Federal Constitution, that that would not be sufficient grounds for the convening of a 3-Judge Court. It must be against the constitutionality of the United States, and that is as laid down here by Ohlinger.

The Court: Now let's go to some other thing.

Mr. Biggs: Yes, your Honor.

The Court: You want to be heard, Mr. Etling?

Mr. Etling: I haven't very much to add, your Honor, except that as far as this Fair Labor Standards Act is concerned, this Court has jurisdiction, and I cite as authority the case of *Womack v. Consolidated Timber Company*, which was decided by Judge Fee.

The Court: By the way, why did you think it necessary, or did you think it necessary, to establish the diversity of citizenship?

Mr. Etling: That was just on the question of reasonableness here. I have an additional authority on that, too. *Womack v. Consolidated*, 43 Fed. Supp. 625, and also 132 Fed. (2d) 101; 121 Fed. (2d) 285; and then the case of *Berger v. Glouser*, [77] 36 Fed. Supp. 168. Regardless of diversity of citizenship or amount in controversy District Court had jurisdiction in this action.

I have a case that I want to go into on this other point of the constitutionality under the Oregon

Constitution, which is a case of a kind very similar and practically on all fours with the case here.

The Court: All right. I will hear you.

Mr. Etling: Now?

The Court: Yes.

Mr. Etling: At this time I wish to urge that the state statute of limitations, the one in question here, violates Article IV, Section 22 of the Oregon Constitution, in that it violates the provision of the Constitution, which states——

The Court: Senator Irving Rand, who was the author of the bill, is present. I called to ask him the other day about some of the facts about the introduction of the bill and its passage, and I am sure everybody joins me in welcoming him to take part in this discussion, if he would care to.

Mr. Etling: We will be glad to have him.

Mr. Rand: Yes. I would like to listen to the discussion. I don't know what the issues are. I haven't read the briefs, so I won't be prepared to say very much.

The Court: Well, you may have a chair and feel free to take part. You know Senator Rand, Mr. Etling. [78]

(Mr. Etling was here introduced to Senator Rand.)

Mr. Etling: Shall I proceed?

The Court: Yes.

Mr. Etling: We wish to urge it follows that section of the Oregon Constitution that states that no act shall ever be revised or amended by mere reference to its title.

The Court: You want to take part in this? We just asked another man up here.

Mr. James Landye: I beg pardon?

The Court: I say, did you come here with a chip on your shoulder? We just asked another man in here.

Mr. Landye: No. I just came to listen, your Honor.

The Court: All right.

Mr. Etling: But the Act revised or section amended shall be set forth at full length. And in this regard I also wish to urge that the act violates Article I, Section 21 of the Oregon Constitution, in that it impairs the obligation of contracts in the Oregon Constitution, and also it violates the Oregon constitutional provision on due process.

Now leading up to this case, I wish to cite the case of 39 Fed. 376, the Barrowdale case, and that was a case before Judge Deady of this court, decided in 1889, and I would like to mention to the Court, the Court already knows that Judge Deady was a Justice of the Territorial and Supreme Court of [79] Oregon for about ten years. He also presided at the Constitutional Convention in Oregon as Chairman, and he was District Judge until his death, a period of about, I believe, twenty or thirty years; and also Judge Deady at the time compiled the Oregon Laws.

The Court: And you might add he was red-headed and his picture appears above me.

Mr. Etling: In this Barrowdale case, speaking

of the intention and purpose of this Constitutional provision, he states:

“The purpose of the Constitution in requiring the ‘subject’ of an act to be expressed in the title thereof is apparent, and has often been stated by Courts and Judges with great unanimity. Briefly, it is to give notice to members of the Legislature and others concerned of the general scope and purpose of the proposed legislation, and to prevent the enactment of laws containing clauses and provisions not indicated by the title, as therein expressed. Therefore, the Constitution is not complied with in this respect by the expression of a or any subject in the title, but the subject of the Act must be truly expressed.”

Then getting later down to the Oregon Decisions there is the State Ex Rel Thomas v. Hoss, 143 Ore. 41.

Proceedings by Deputy Labor Commissioner to require Secretary of State to audit plaintiff’s claim and issue a warrant. [80]

In this case the Legislature enacted a law providing for a temporary reduction of salaries of state officials and the Act contained an emergency clause, whereby it became effective, on the signature of the Governor, as the case at bar, and also there was a section that repealed all acts and parts of acts in conflict therewith.

Among the contentions of the plaintiff was that the Act violated Article IV, Section 22 of the Oregon Constitution, and on the day that the law took effect there was already fifteen days’ salary earned

by the party involved here. It was held that the right to this salary was vested and cannot be taken away by the legislation thereafter enacted.

The Court: What is the Article referred to?

Mr. Etling: That is the section I just read, that every Act must be set forth—"No Act shall ever be revised or amended by mere reference to its title, but the Act revised or section amended shall be set forth and published at full length."

The Court: Yes.

Mr. Etling: And then going on, the Oregon Supreme Court expressed the purpose of this:

"This section was adopted for good reasons. It has been a custom with our legislators to amend existing laws by mere reference to their titles, and under that cover to change words and phrases anywhere in its sections, to insert [81] and strike out sentences; to repeal parts of sections at one session, and at the next to repeal and amend until it had become a real task to discover what was the existing statute on many subjects, and without the utmost watchfulness the legislators could not know the extent or effect of proposed amendments."

In the case of *Donlan v. Barnard*, 5 Ore. 390, the Court again expounded the purpose of this Constitutional Provision, and it stated:

"Hence, the Legislature is required by our Constitution to set out and incorporate in the amendatory act not only the changes made in the Act amended, but the portions thereof not effected by the amendment in such manner that the syntax and meaning of the law as amended will be complete

within itself. This is required in order that those who are interested in knowing what the law is may find it out without prospecting through a labyrinth of words, phrases and sentences, as found in a long list of acts amendatory of the others, to ascertain what the law is in force at the time."

The Court: Of course I would expect you to have strong opinions about this case. I had a warehouseman's case that you had where \$3.75 was involved, or some such sum, and I took two days here in trying to correlate the Oregon statutes on warehousemen.

Mr. Etling: Yes. I remember that very vividly, your Honor. [82]

The Court: I would have been glad to put up the \$3.75 many times during the two days but I didn't see any way to do it really. I pretty near lost Laird McKenna's friendship over it. He was on the other side. He thought it was a great waste of time. I didn't hold with you, either, did I?

Mt. Etling: Yes, you did, but I don't believe your Honor decided it under the Oregon statutes. That was on a mechanic's lien.

Now finally, in 25 R.C.L., Sections 117 and 119, it is stated:

"But if an Act is not complete in itself, and is clearly amendatory of a former statute, it falls within the constitutional inhibition, whether or not it purports on its face to be amendatory or an independent act."

And it states: "Even though an Act professes to be an independent Act and does not purport to

amend any prior Act, still if, in fact, it makes changes in an existing Act by adding new provisions and mingling the new with the old on the same subject so as to make the old and the new a connected piece of legislation covering the same subject, the latter Act must be considered an amendment of the former and as within the constitutional prohibition."

Now at this time I wish to cite a case of *Sayles v. Oregon Central Railway Company*, decided by this Court in 1879, again by Judge Deady, and it is a short case. It might be [83] easier for the Court to refer to the case.

The Court: Get that, will you.

Mr. Etling: It is 6 Sawyer 31.

The Court: Go right ahead while I am looking at it.

Mr. Etling: Now that was an action for damages for patent infringement and the defendant demurred to the complaint and alleged the action was barred by the lapse of time. Section 55 of the Patent Act of 1870 provided that actions arising under the patent laws "shall be brought during the term for which letters patent shall be granted or extended, or within six years after the expiration thereof."

In the Revised Statutes said Section 55 is reenacted as Section 4921, less the limitation clause above quoted, which was repealed by operation of Section 5596 of the Revised Statutes. Section 721 of the Revised Statutes reenacts Section 34 of the Act of September 24th, 1879, making the laws of

the several states "rules of decisions in trials at common law", except where the laws of the United States otherwise provide. Now under this Act, this Rules and Decisions Act, it has been uniformly held that when Congress has not otherwise specially provided, the state statute applies to actions in Federal Courts. It follows unless there is a savings clause in the Federal Statutes as revised, that only a state statute would apply.

Now plaintiff, or, rather, the defendant, assuming [84] that there was no saving clause, contends that this action was barred by Subdivision 1 of Section 8 of the Oregon Civil Code, which limits commencement of actions enumerated to two years from the time cause of action accrued.

Originally the clause in Subdivision 1 of Section 8—that is the Oregon Code—concerning actions for any other "injuries to the person or rights of another", under which it is sought to bar this action, was contained in Subdivision 5 of Section 6 of the Territorial or of the general laws of Oregon, and that gives six years in which to sue upon causes of action therein enumerated. But by the subsequent Act of October 22nd, 1870, Oregon Session Laws of that date, it was attempted to amend both Sections 6 and 8 of the Code as it had previously existed, by simply repealing Section 5 of the Code and repealing and re-enacting Section 8, so as to include in Subdivision 1 thereof the cases before then provided for in Subdivision 5 and thereby reduce the time within which actions might be brought from six to two years.

The Court said:

“It can hardly be doubted that this attempt to amend said Section 6 by simply repealing a certain portion of it, is in direct violation of Section 22 of Article IV of the Constitution of the State, which provides that ‘no Act shall ever be revised or amended by mere reference to its title, but the Act revised or section amended shall be set forth and [85] published at full length.’ ”

The Court goes on to say, now although Section 8 may have been properly amended, yet, if Section 6 was not, then Subdivision 5 thereof is still in force; wherefore, the result is that there are two periods of limitation in the statute for actions of this kind—one for six years, the other for two. In such a case the plaintiff may avail himself of the longer period, and the shorter is practically a nullity.

I believe that case is practically on all fours with the case before us.

The Court: You might tie it up a little further now. Why do you think it is?

Mr. Etling: Well, I think that because the applicable state statute, prior to the passage of this six-months and 90-day statute, was Section 1-204 Oregon Code, 1940, which stated that actions **must** be commenced within six years; first, upon actions for contract or liability, express or implied, excepting those mentioned in Section 1-203, and, two, upon an action for liability created by statute other than a penalty or a forfeiture.

We contend in this case this is a liability created

by statute and we have a number of decisions to support that, if the Court is in doubt of that.

Now the six-months statute—we have a copy of the [86] Session Laws. We have failed to set forth the section which it really amended there. It makes no reference to it whatsoever, and I don't know whether your Honor has——

The Court: I have got it here.

Mr. Etling: Also I have the Senate and House Journals, which show all the proceedings that were taken by the Legislature on this question, and there was one case where any real objection seems to have been raised. That was raised by Senator Mahoney, joined in by Senator Strayer, and they objected to this 90-day clause. I don't know whether your Honor has seen——

The Court: Of what value is that?

Mr. Etling: That all the more confirms this objection that if the Act had been set forth fully as presented to the legislators the possibility of the results might have been different.

The Court: Now just how is this like the Deady case?

Mr. Etling: Now in this case this Act, the six-months Act, amended and changed the previous statute of limitations which I have just read, six years. In the Deady case the statute of limitations had previously been six years and the amendment reduced it to two years. And I also have the Session Laws in that case, as well as the general laws. Examination of them will show that this is even a more flagrant violation than there was in that case, and in that case——

The Court: Where did you find the Deady annotation? [87]

Mr. Etling: I found that in the Oregon Code.

The Court: Under a section of the State Constitution?

Mr. Etling: Yes. I have it here, if your Honor wishes to refer to it.

The Court: No. I just wondered if it had been picked up by codifiers and carried along.

Mr. Etling: Yes, it had. Now I have a few more things to say but I don't want to interrupt this particular phase of the proceedings.

The Court: You had better complete your argument on all points.

Mr. Etling: All right. I have these authorities, if the Court wishes to examine them. Now I wish to cite to the Court 66 A.L.R., page 1483, also where it is stated that, "It is the uniform rule that where there is a valid act and an attempted but unconstitutional amendment to it, the original Act is not affected, but remains in full force and effect, even though there are express words of repeal, unless it is clear that the original intended such repeal."

And I also wish to comment on the case of *Koshkonong v. Burton*, cited by counsel for the defendant at our last meeting. I have examined this case and I have my doubts whether, on the authority of this case, the Court would find anything to assist in holding the six months part of the statute applicable, should the Court find the 90-day portion [88] is unconstitutional.

The Court: I will be glad to hear you on that.

Mr. Etling: In this particular case there had previously been a 20-year statute of limitations and it was reduced to six years by the Legislature but it had a one-year savings clause. Where the period of time was about ready to lapse it was thought that they should have one year to present it, and the plaintiff in this case attacked the Constitution as impairing the obligations of contracts, and attacked particularly that one-year statute, and the Court held in that case that if it declared the one-year unconstitutional—I believe it did—that the six years would not necessarily become controlling at all.

The Court: He didn't rule on that. That is about the only thing I can understand in that opinion. He says explicitly he doesn't want to rule on that question, as to whether the one-year statute was too short, and, therefore, unconstitutional.

Mr. Etling: Yes, but the Court indicated a reasonable time would be allowed. But I did find some consolation in the case, particularly on this question of nonresidence, and I wish to cite it to support this other case that I have in my brief. It is *Adams & Treese Company v. Kenoyer*.

In this *Koshkonong* case, page 675, the Court recognized that what would be reasonable time might be different in the [18] case of nonresidence of a party, and made this comment:

“Whether the first proviso in the Act of 1872, as to some causes of action, especially in its application to citizens of other States holding negotiable municipal securities, is or not in violation of that

condition, is a question of too much practical importance and delicacy to justify us in considering it, unless its determination be essential to the disposition of the case in hand."

The Court refused to rule on it because it was not before the Court.

I believe that is all. If there is any doubt of the Court as to whether or not this is a penalty or liquidated damages, I would like to cite some additional authorities.

The Court: Well, how is that?

Mr. Etling: If there is any doubt in the Court's mind as to whether or not this 16(b) of the Fair Labor Standards Act is a penalty statute, or, rather, a liability created by statute, we have some additional authorities.

The Court: There has been no issue made on it by the other side, has there?

Mr. Etling: We have cited some authorities in our original brief.

The Court: Has the other side made any issue of it?

Mr. Biggs: We haven't made any particular issue on that.

The Court: No. [90]

Mr. Etling: Other than referring the Court to some of these original Acts, that is all I have.

The Court: I have a little personal matter which will take me fifteen minutes. I will be back after that time. That will give you a chance also to

check over material about this Deady case. I would like to have you consider it now.

(Short recess.)

Mr. Etling: Your Honor, I realize my time is up but I do want to mention that I also have the Iowa Session Laws containing a copy of that statute from Iowa that was held unconstitutional.

The Court: What does it say? You stated here the other day it was directly and solely against the Federal Statutes?

Mr. Etling: Yes.

The Court: And not against the Fair Labor Standards Act alone, I suppose?

Mr. Morris: That is correct.

Mr. Etling: It says, "All rights under Federal Statutes. In all cases wherein a claim or cause of action has arisen or may arise pursuant to the provisions of any Federal statute, wherein no period of limitation is prescribed, the holder of such claim or cause of action may commence action thereon within but not after a period of six months before March 1st, 1943, if such claim or cause of action arose prior to March 1st, 1943, or within but not later than six months after the accrual [91] of such claim or cause of action if such claim or cause of action arose after March 1st, 1943."

Mr. Morris: May it please the Court, I will endeavor to confine my remarks to the question of conflict of this statute with Amendment 22, Article IV, of the Oregon Constitution.

I think it would be helpful if we should first con-

sider the evil at which the Constitutional provision was aimed, as obviously the provision will be construed in the light of the evil—the Territorial Laws of 1959, several of the Territorial Laws, which serve as examples of the type of legislation which the amendment was designed to prohibit.

In 1859, at page 61, this is one of the Territorial Laws and will serve as an illustration:

“An Act to amend an act entitled, ‘An Act relating to roads and areas.’

“Section 1 . . . that the act relating to roads and areas be so amended that the word ‘April’ wherever it occurs in Title 4th of said Act, be changed to ‘December’, and that the word ‘May’ in Section 27, be changed to ‘March’.”

Again, another act in the same report, “That the act entitled ‘An Act relating to “stallions”, passed January 10, 1954,’ be, and is hereby amended, by striking out the words ‘two years’, in the first section of said act, and by inserting the words ‘eighteen months’ in the place of the words so stricken out.”

Well, there are numerous other examples, but that [92] will serve to show what the policy of the Territorial Legislature was.

Considering the Constitutional provision, I think the conclusion may safely be drawn, after a study of the Oregon Supreme Court cases, that a statute which is complete within itself, a statute which does not patently attempt to amend the existing legislation, does not fall within the ban of the Constitutional provision.

A statute which in form is independent legislation is not subject to the criticism that it does not comply with the Constitution.

The fact that such a statute amends or repeals by implication existing statutes does not violate the Constitutional provision.

I think the leading case in Oregon, construing the Constitutional provision, is *Warren v. Crosby*, reported in 24 Ore. 558. The question there arose on the power of the City of Astoria to levy and collect taxes. There had been a special Act creating Astoria, giving the council the power to assess, levy and collect taxes. A general law was then enacted, or thereafter enacted by the state legislature, which covered the assessment and levy of taxes, and, in effect, repealed the provision in the charter of the City of Astoria, under which the council attempted to act. This suit was brought to enjoin action by the councilmen under the previous law. There is a [93] lengthy and quite an enlightened discussion of the effect of this Constitutional provision. I will not attempt to read all of it. Referring to the Constitutional provision the Court said:

“The language of that provision is both prohibitory and mandatory. By its terms it inhibits the revision or amendment of an Act by mere reference to its title, and requires that the Act revised, or section amended, shall be inserted at length. It does not purport to limit or restrict the power of the Legislature in the enactment of laws; it relates only to the mode or form in which the legislative power shall be exercised. The evil it sought

to remedy was the mode in which the legislative power was sometimes exercised in the enactment of advisory or mandatory laws. This evil, as is well known, was the practice of amending or revising laws by additions or other alterations, which, without the presence of the original law, were usually unintelligible. Acts were passed amending statutes by substituting one phrase for another, or by inserting a sentence, or by repealing a sentence, or a part of a sentence, in some portion or section thereof, which, as they stood, often conveyed no meaning, and, without examination and comparison with the original statute, failed to give notice of the changes effected. By such means, an opportunity was afforded for incautious and fraudulent legislation, and endless confusion was introduced into the law. Legislators [94] were often deceived and the public imposed upon by such modes of legislation. To prevent these consequences, and to secure a fair and intelligent exercise of the law-making power, was the object of the Constitutional provision in question."

"While, therefore, the effect of the Act was to alter or change to this extent an existing power, it was produced by such Act repealing *pro tanto*, by implication, the section of the charter which conferred it. The Act itself was complete—its meaning and scope plain and apparent; nor was there anything on its face to evince an amendatory character. It was an independent Act of legislation designed to regulate the sale of liquor in the state."

This is referring to another case.

“When an Act of this character so operates as to modify or change prior acts of legislation, it does not fall with the mischief designed to be remedied by the Constitution, although the effect is to alter or amend by implication some prior legislation upon the same subject.”

Now the statute here involved is not designed as amendatory legislation. It is complete upon its face. It is independent legislation and meets the tests established by the Oregon Supreme Court.

I think the excerpts I read will serve to distinguish the decision by Judge Deady. The legislation involved in that [95] case was this:

“That Subdivision 5 of Section 6 of Chapter I of the Code of Civil Procedure be hereby repealed.”

Judge Deady suggested that that did not comply with the Constitutional provision, and that was one of the faults, as this Crosby case points out, that the Constitution was designed to cure. All that the Deady case holds is that the Legislature may not expressly repeal a portion of a statute by reference to a subdivision. We do not have that type of situation here, your Honor. I can go on and labor the point and refer you to all the Oregon cases. I think you will find *Warren v. Crosby*, and *State v. Hoss*, 143 Ore. 41, as enlightening as any, and I think the principles that they establish can lead only to the conclusion that this statute does not violate the Constitution.

I have nothing further to add, unless there is some question. Do you care for the citations of all the Oregon cases, your Honor?

The Court: No.

Mr. Biggs: I don't know if there is anything more, if the Court please, on any of these points that can be added that has not already been said. Mr. Mundorff called to my attention during the recess that these annotations would seem to bear out the proposition that this Court clearly in this case has the authority to pass on the constitutionality of the Act. [96] It calls attention to this statement in the annotation establishing that a single Judge may even pass on an application for a permanent injunction, relying upon or asserting the unconstitutionality of a state Act if no interlocutory injunction is sought in the beginning.

The Court: Do you want to add anything to the claim you made the other day for the Koshkonong case.

Mr. Biggs: Well, I have read that case, your Honor, and have done some additional research in connection with it. I don't see how the case can stand for anything other than the proposition we asserted for it the other day. In the Koshkonong case the Supreme Court said, We do not find it necessary actually to pass upon the reasonableness of the one-year saving clause because the fact is the action was not brought within the six years provided by the new statute, in admitting that the six years in any event would be a reasonable time, and since it was not brought within that time but was brought within eight years after the case had accrued—after the statute had been passed—that it was brought and gave as its reasons, your Honor,

the principle that if the savings clause did fall, so that an action that had not been barred by the previous statute of limitations, and was still an enforceable cause of action when the new statute was passed—if the new statute cut it off immediately, [97] then of course it may be said to be unconstitutional, because it deprived him of property without due process, but if it provided a savings clause, which was insufficient in length of time, the savings clause would be inoperative and a reasonable time would be given after the enforcement of that cause of action.

The Court: Why?

Mr. Biggs: Because if the other is unconstitutional, then the savings clause is unconstitutional. That does not mean the entire Act falls. Only that part of it that is declared to be unconstitutional is eliminated; then a reasonable time must remain. What is a reasonable time evidently is left to the Court but the Court in that case considered six years——

The Court: What time is a reasonable time?

Mr. Biggs: Well, a reasonable time must remain to future determination. I think it is conceded by most Courts if the new statute of limitations coming to be applied immediately, were held to be effective so as to bar at that time existing causes of action which were still alive under the old statute, then it would be held unconstitutional as being in conflict with several sections of the Constitution.

The Court: Wasn't that rewriting the statute?

Mr. Biggs: They haven't held it as rewriting the statute. They have held, in the Koshkonong case that by seeking a construction of the statute that will save its constitutionality, the Court is acting within its prerogative; that is, that it should seek always to find a construction which will preserve the constitutionality of the Act.

The Court: Justice Harlan never used that phrase in that opinion.

Mr. Biggs: No. Didn't use which phrase in that opinion—in the Koshkonong case?

The Court: Yes.

Mr. Biggs: No, I think that he did not, although I think that is probably implied in the opinion, and I think that principle has been asserted by other Courts, and I think the Koshkonong case has been cited to support it.

The Court: Was this his argument, do you think, which he didn't put on paper, but was this his reasoning: That if the savings clause fell, that would leave the 20-year statute as to accrued causes?

Mr. Biggs: Yes.

The Court: The old statute in that case was twenty years.

Mr. Biggs: That is correct.

The Court: And would give subsequently accruing causes six years only?

Mr. Biggs: That is correct. [99]

The Court: And would make the statute so lopsided that it would defeat the whole statute.

Mr. Biggs: I think that is fairly inferably from

that, your Honor, because clearly the Legislature must be believed to have not wanted the 20-year statute. That was too long a time. They no longer wanted that to be operative. They attempted to amend it and thereby declare the public policy of the state to shorten the time and not permit the accumulation of twenty years. Now there would be a distinction between causes of action accruing before that time and causes of action accruing after that time.

The Court: So, if that is what the learned Justice had in mind, although he certainly didn't get it on paper—if that is what the learned Justice had in mind applying to this case, if the savings clause of 90 days were to fall here, that would leave the accrued causes under the six-years statute.

Mr. Biggs: We don't agree with that. That is contended for by counsel here but we don't believe that under the Koshkonong case that would be effective.

The Court: Well, I guess there is something else then. I thought we had just said in the Koshkonong case—how is that spelled?

Mr. Biggs: Koshkonong—K-o-s-h-k-o-n-o-n-g.

The Court: All right. I thought we just said in the Koshkonong case that what Justice Harlan must have had in [100] mind was that if the savings clause of one year fell that would leave the old 20-year statute applicable to accrued causes as against six years only for subsequently accruing causes.

Mr. Biggs: Oh, I see. Well, I think that is one

alternative that we thought might occur, but I think he really held that to avoid that alternative being held operative and no six-year statute. That is what I thought the new case stood for. We have read it so many times and it is a difficult thing to understand from the language.

The Court: I know. The more you read it the worse off you are.

Mr. Biggs: Yes. It says this: "Whether the first proviso in the Act of 1872, as to some causes of actions, especially in its application to citizens of other States holding negotiable municipal securities, is or is not"—that is the savings clause—"is or is not in violation of that condition, is a question of too much importance and delicacy to justify us in considering it."

The Court: Of course he didn't have it before him in that case? He didn't have the one year, did he?

Mr. Biggs: Yes, he did, your Honor, because the coupons at the time the 1872 Act was passed, the coupons were still alive in the 20-year statute. Then the 1872 statute was passed giving them six years. He didn't actually bring his [101] action until eight years after the 1872 action had passed, and that is the reason that the Court said it is not necessary to consider this one-year statute because, in any event, he didn't bring it within the remaining six years, and also said, "We think it is not necessary to consider it. If the proviso, in its application to some cases, is obnoxious to the objection that it does not allow sufficient time within which to sue before

the bar takes effect, and is, therefore, unconstitutional, as impairing the obligation of the contract between the town and its existing creditors, it does not follow that the entire Act would fall and become inoperative. The result, in such case, would be, that the plaintiffs and other holders of the coupons would have not simply one year, but—under the construction we have given to the statute in force prior to the Act of 1872—to a reasonable time after the passage within which to sue. And if a proper construction of that Act,” the 1872 Act, “would give the full period of six years, after its passage, within which to sue upon coupons maturing before its passage, the judgment below cannot be sustained.”

The Court: Mr. Biggs, the Legislature passes a law and says that a man who has an accrued claim prior to the effective date of the Act, has 90 days within which to sue on the claim, and that claims subsequently accruing must be brought within six months. One of the former class going to a lawyer on the ninety-first day is told that his claim is barred, he can't [102] bring his case, and then he gets another idea and a year later sues. He is met with the limitation statute. He is met with the argument that he had six months and he didn't sue within the six months, and he says, “But the statute says I have ninety days and I went to a lawyer on the ninety-first day and he said I was one day too late. If I had known then I had six months, or if the lawyer had known I had six months, he would not have told me that; or if I had known I had six

months I would have gone and got another lawyer.” He said, “I was just going by what the statute said, and this is an idea all made up after the fact to uphold the statute but it works out very badly for me. It looks to me like somebody is rewriting the statute. It looks to me like I was entitled to be guided by what the statute says as to my case.”

Mr. Biggs: In the case that your Honor has put, you illustrate the difference in the application of this statute to various individuals. Now I don't think anyone contends that the ninety days can be prolonged to six months by words of the statute, but I think that in the Koshkonong case and the Sohn case, the one I am going to refer to a little bit later—I think the Court, in the Koshkonong case, simply said: “We don't have to determine whether the one-year statute is reasonable or not reasonable in this particular case, because even if we hold that it is unreasonable, and, therefore, falls, he still has not brought his action within the time [103] that would be applicable if the one-year statute were not applicable or were not valid.”

I think it is simply a rule that the Court in that case adopts to avoid passing on the constitutionality of the one-year period.

He says, “It is not necessary to pass on that, because this man didn't attempt to exercise his rights within that one year. If he had, then it would be necessary for us to determine whether or not it was or was not barred, but since he didn't, and also then didn't exercise his rights within the

remaining six years, that certainly would have been a reasonable time, and, therefore, the applicable period. He is not here in this particular case. The circumstances are not such that we are required to pass on it."

I think that is the explanation of the Burton case.

As to the general principle of the applicable statutes of limitations where no savings clause at all is provided, the Supreme Court in the *Sohn v. Waterson* case has considered the proposition. Of course if the Court is not familiar with that case I would like to call your attention to the facts of the case. That is reported in 17 Wallace Reports 596.

In that case the plaintiff, Sohn, a resident of Ohio, had recovered a judgment against Waterson, who was also a resident of Ohio. That is in 17 Wallace 596, back in 1854. [104] Waterson then removed to Kansas and after he had been in Kansas about three years Kansas passed a statute of limitations applying to judgments, bonds, notes, and so on, and requiring that the action be commenced thereon within two years from the date of accrual of the cause of action. Here Waterson had been sued in Ohio, judgment had been obtained against him, and then he had removed to Kansas and after he had been in Kansas a short time, or about three years, a Kansas statute was passed reducing the time to commence an action on judgment to two years. Previous to that time I think there had been no statute of limitations at all on it. Sohn

came into Kansas then and he sued Waterson in Kansas on the judgment and the statute of limitations was pleaded. The Court overruled the demurrer to the statute and entered the judgment for the defendant, sustaining the statute.

Plaintiff, on appeal, contended that since the statute contained no savings clause as an existing cause of action more than two years old, it was unconstitutional and, therefore, there was no statute of limitations applicable at all. That was the contention made by the plaintiff.

The lower Court's judgment was affirmed and it was held by the Supreme Court that in this case, where the statute contained no savings clause, the statute should be so construed as to preserve its constitutionality, if possible; that is, if it were construed to apply retrospectively; and [105] to cut off all judgments, valid judgments, immediately upon the effective date of the passage of the statute, which probably would fall within the ban of the Fourteenth Amendment—would fall because of being in conflict with the Constitution.

The Court said that, since, at the date of the passage of the statute, the right would have been cut off at once, which would render it unconstitutional, construction will be given to it to preserve the constitutionality of the statute. The Courts will declare that it operates prospectively on accrued as well as on future causes of action, and it says this results, citing the *Koshkonong* case—no; it was earlier than the *Koshkonong* case. Yes, it was earlier than that. It said there were three

theories that the Courts took to sustain this result. One is that the new action will apply, or the new statute will apply only to causes of action occurring in the future. It said that this is not a desirable theory, because that leaves existing causes of action without any statute of limitations applicable to them at all. Secondly, that the Court might apply the statute to such existing causes of action as have only partially run out the time allotted by the new statute, and holding that there is a reasonable time left, then that they come within the ban of the new statute. Of course, if there is no reasonable time left, the criticism of that rule is the same as the first one, that [106] it leaves the original cause of action without any statute of limitations at all, which is of course contrary to the announced policy of the Legislature in attempting to fix a time; but, it says, the next theory is the calculating of limitation as of the effective date of the statute, allowing the period of the statute from and after that date as the time for the commencement of the action, regardless of how long before the cause of action accrued.

That case has been rather widely cited, and I think it generally is followed. It is true it is distinguishable perhaps from the case at bar, because in the case at bar the Legislature did clearly express its intention as to how the statute should apply to existing causes of action. It said it should apply to cut off existing causes of action unless the action was instituted within ninety days. So that the Legislature's intention in our case is very clear.

There is not any particular rule to pass upon what the Legislature really intended or meant with respect to existing causes of action. It very clearly stated that they should be brought within ninety days after the date of the statute—the effective date of the statute.

Now our question, of course, is, if the Court determines that it must declare the 90-day period invalid as being unreasonably short, and that the circumstances that the Legislature might have had in mind persuading the Legislature [107] to adopt ninety days as to existing causes of action and six months as to causes of action accruing thereafter, that is, if the Court can, and does say, as a judicial matter, the Legislature acted unreasonably in fixing that time, then it does become necessary for the Court to determine what must have been the unexpressed intent of the Legislature in that event as to existing causes of action, whether the Legislature was intending that existing causes of action not brought within the ninety days have the benefit of the full six-year statute of limitations existing prior to that time, or shall have the benefit only of the six-months period applicable to causes of action accruing thereafter, and while the Koshkonong case is not satisfactory in respect of clarity it is difficult to understand just exactly what the Justice did have in mind, still I think it does stand for the proposition that in a case of this kind, judging this particular case, where the action was not brought until after the longest period provided by the new statute, the Court either in this case

may hold that it is not necessary to pass on the validity of the 90-day savings clause because he didn't attempt to avail himself or bring himself in the remaining six months.

The Court: That is assuming the date, six months, was not unreasonable?

Mr. Biggs: Assuming that the date, six months, was not unreasonable; that is true; but it all gets back eventually to [108] the ultimate determination of the question as to whether the Court can say, as a matter of law, upon the showing made in this case, that the ninety days or six months is unreasonable. In that connection it appears that the Court so to hold almost would have to declare that it was *per se* unreasonable, because there has been no showing here of extenuating circumstances other than the fact that the plaintiff moved to Vancouver, Washington, which the testimony shows is within the same industrial area as Portland; he traded in Portland; that he took Portland newspapers and had really as much opportunity to be advised of the new statute and to learn of it as Oregon residents. That is the only circumstance shown in this case as to the harshness of the statute or the fact that it did not give plaintiff's prospective plans a reasonable time within which to bring their actions.

We have cited cases to your Honor, a number of cases, in which courts have gone both ways on it, but I think the majority of the courts have held with respect to periods that are short, that the time is reasonable, or, at least, that the courts cannot

say, as a matter of law, that the Legislature acted unreasonably in fixing that time.

The Court: Now this man in Lane County, suing before Judge Skipworth, sued for \$6,000 approximately overtime and \$6,000 as liquidated damages, and the further sum of \$1200 attorney's fees, and he wanted \$13,200 from Lamm down there [109] in northern Deschutes County—rather, I guess in Lane County, and he filed his complaint in October, 1943, and the statute was pleaded, as you know, and Judge Skipworth upheld it.

Mr. Biggs: As to both I think the 90-day and the six-months. I think that was involved in that case, to, wasn't it, your Honor?

Mr. Davies: That was an accrued claim.

Mr. Biggs: That was an accrued claim, so it would not be——

The Court: Yes, it was an accrued claim and the six months ran out.

Mr. Biggs: About August, I imagine, or September, wasn't it? September, I believe, your Honor.

The Court: September?

Mr. Biggs: I think so. It would be six months from March.

The Court: About thirty days before he sued?

Mr. Biggs: Yes.

The Court: Now knowing Lamm, as I do, and Judge Skipworth as I do, and Judge Harris, who defended the case, as I do, it would have been very interesting to have seen the position they all would

have taken had this man sued in August for this twelve thousand dollars.

Mr. Biggs: Mr. Davies was down there. I don't know whether that was argued.

The Court: If he had sued thirty days on an accrued claim, which the statute says was killed in June. [110]

Mr. Biggs: That is right.

The Court: If he had sued thirty days before the expiration of the six-months period, which the statute said was for subsequently accruing cases, instead of thirty days after the six-months period, I imagine he would have been met with pretty strong contention that the 90-day section, and that alone, controlled his action.

Mr. Biggs: Of course, the situation is analogous to this, only our man, the plaintiff here, has moved from the community. Mr. Davies was down there. I don't know whether that matter was discussed in the argument or not.

Mr. Davies: I appeared as a friend of the Court, and Mr. Etling was, I believe, that kindly phrase *amicus audio* at that time. He coined the phrase. I don't recall that the six months was discussed. I think the entire discussion was the ninety days. Do you remember, Carl?

Mr. Etling: Well, I have copious notes that I took on the matter but I don't remember—

The Court: That is really not what I am bringing up. What you are saying now in this case is that Mr. Etling's client, who had an accrued claim which was covered by the letter of the statute with

the 90-day clause, because he did not sue within six months, which, by the letter of the statute, applied only to subsequently accruing claims,—you are saying now that he had the benefit of the six months but he didn't [111] use it?

Mr. Davies: We are saying that the statute—of course, our first contention is that the ninety days is proper. If the Court should take a different view of that we believe, under the authority of this case, he would be barred in any event, because he fails to come within the six months. Yes, that is right.

The Court: All right. That is hardly what the Koshkonong case said. He does not pass on the savings clause in that case.

Mr. Davies: That is right.

The Court: Refused to pass on it and said he does not have to pass on it because the man didn't sue within the six months.

Mr. Davies: That is right.

The Court: So applying that to this case you say I don't have to pass on the 90-day clause because the man didn't sue within the six months.

Mr. Biggs: That is correct.

The Court: So I say it would have been interesting in the Lane County case had the man sued within the six months but after the ninety days.

Mr. Biggs: That is correct.

Mr. Davies: I just wanted you to know it didn't come up down there.

The Court: Well, it didn't come up because he was thirty [112] days over the line.

Mr. Biggs: Of course, as you read the statute, the intention of the Legislature is made clear in the 90-day proviso, but, if we remember, declared unconstitutional, the statute still is a whole statute and does actually by its terms apply to accrued as well as accruing causes of action, because it uses that word, accrued or accruing. That will be literally the interpretation of the statute. We know what the Legislature had in mind at the time it passed it. But if the Court says whatever the legislative intention may have been the proviso will stand, then the Court is faced with the construction of the remainder of the statute and, with that literally construed, would apply it to existing or accrued causes of action.

I don't know that there is anything more that we can offer, your Honor, on the point.

The Court: What about *Simpson v. Winegar*? Do you want to say any more about that, in 122 Ore. 297?

Mr. Morris: If your Honor please, that was a case that we found when you referred to an opinion by Judge Rand on the emergency legislation passed during the session and apparently that was not the decision you did have in mind.

The Court: Of course it was. I have made some inquiries around since. I guess my memory wasn't good.

Mr. Morris: To the extent that case is applicable I think [113] it supports us. That was a case where the individual party involved had no knowledge of the legislation and he didn't comply with the new

statute, which was an emergency measure, and so had lost his opportunity for a hearing.

The Court: I don't think any lawyer of standing would dare, after the adverse reaction that followed in the profession, to sponsor similar legislation again, amending the practice code on a jurisdictional feature and attaching an emergency clause to it. I talked to Judge Tooze, who was one of the unfortunates in *Simpson v. Winegar*; he was then in partnership with Mr. Vinton; and he says there were about two dozen lawyers throughout the state, as you remember, whose appeals were wrecked for them for the same reason that Vinton & Tooze lost their appeal, simply because the law had become effective before the profession became advised of it through publication of the Session Laws. So that is, I think, one of the serious questions in this case. There were actually nine or ten days, weren't there—you gave me that figure the other day—after the publication of the Session Laws, which presented this Act to the profession as one of the acts of the Oregon Legislature—ninety days from March 20th, and the Session Laws were published nine or ten days, weren't they, before the ninety days ran out? Didn't you tell me that the other day?

Mr. Davies: They were published the very first part of June, your Honor. I don't remember. I intended to check [114] that and advise you.

The Court: Somebody told me the other day that figure was presented before Judge Skipworth down there.

Mr. Davies: That point wasn't elaborately discussed by the attorney for the plaintiff there. I think it was ninety days. We can get the precise time.

The Court: It doesn't matter. This Act was passed on March 20th.

Mr. Bigges: That is correct.

The Court: And it was approved by the Governor on that date and it became effective immediately, and so the ninety days as to accrued claims began to run then, so they all ran out June 20th, approximately, and the 1942 Session Laws were published and in the hands of the profession sometime early in June and there were nine or ten days, you said here the other day, between the time of the publication.

Mr. Davies: I am sure it would not exceed two weeks probably. It might have been somewhere between ten days and two weeks.

The Court: As bearing on the question of reasonableness of this legislation I attach a great importance to that, and I attach considerable importance to the reaction in the profession to that tinkering that was done with the practice act back there in 1927. The reaction was very violent. I haven't had time to go back and look over the periodicals of the time [115] but I am sure that the Bar Association in the state took some action about it and took a firm position against that sort of legislation. I am told, further, that the reason for that 1927 Act was because of a particular situa-

tion in a particular county. There was a lawyer's fight in a certain county in the state, and so that was the idea. The gentlemen on the bottom of the heap decided the way to correct that situation was to go to Salem and have the Legislature pass an act prohibiting the trial judge thereafter from extending ex parte the time when transcripts for appeal might be filed, as that Legislature dealt with, so all the unfortunate bystanders throughout the state who had appeals being made up at that time, and relying on ex parte orders, got caught. I imagine they had a hard time explaining to their clients the mysterious processes of legislation. I don't think anybody could approve of that. I don't think anybody would.

My recollection has been Senator Rand's father was the one who had written the information. He had denounced that way of legislating on that kind of matter bitterly, although he felt impelled in upholding it, but the books show Judge Burnett wrote the opinion of the Court.

So in this case, as to the time element and as to the 90-day clause, I think as a practical matter I am dealing with the time that was allowed to the profession and to the interested parties pretty much after the law became public [116] and notice to the profession through publication of the Session Laws, which was, as it has been said, probably only about two weeks.

Now I have had lots of difficulty with the Koshonong decision but I think I can and should follow the construction that has been put on the statute

by the state judge who ruled on it, which has been presented. You all know that, getting in the Federal Courts, we are bound, even before *Erie v. Thompson*, we are bound in the construction of state statutes by the construction given them by the local judges, and this opinion you have given me from Judge Skipworth dealt with the same kind of a case as this presented here. It was a man who had an accrued claim and who brought his claim, not only more than ninety days after the passage of the Act but he brought it more than six months after the passage of the Act. So the questions were implicit in the same record before Judge Skipworth as are present here and Judge Skipworth goes the whole length in upholding the statute and denies the man relief down there and says it is a bar against the prosecuting of his claim, not because he didn't bring it within six months but because he didn't bring it within ninety days. And so it seems to me that would be just going afieid, unnecessarily and improperly, if I approached a decision in this case in any different way than Judge Skipworth approached a decision of an exactly similar case. He [117] thought he was upholding the 90-day clause, and says so, and said that was what the man's rights were to be tested by, and that is what he tested them by.

So I think the question I have to decide here, and the only one I have to decide, and the only one I wish to decide, is, taking that construction of the statute, guided by the local judge as to whether the 90-day statute is unreasonable in its effect on the

operation of the Federal Wages and Hours Act, under which this man claims, and because I attach so much importance as a practical matter to the working of the emergency clause, by that I mean the fact that the statute didn't come to the notice of the public through the usual channels, the publication of the official Session Laws, until a very short time before the 90-day period ran out, I don't feel able to uphold the 90-day clause, contrary to Judge Skipworth's rulings. I am bound by his ruling, I feel, as to the state Constitutional questions that have been presented.

While the point was raised by Mr. Etling, this morning for the first time, that this was an amendment to the existing limitations statute, and did not comply with the procedural requirement of the state Constitution, that was implicit in the case before Judge Skipworth and while not presented to him there it would be presumptuous for me to consider it here, but I am not bound by Judge Skipworth's [118] holding as to the Federal question, whether or not the 90-day clause as to accrued claims arising in the Federal Wages and Hours Act, and I take a contrary opinion and will allow recovery, and will allow Mr. Etling \$250 attorney's fees.

Mr. Etling: \$250, your Honor?

The Court: Yes. Adjourn court until tomorrow morning, ten o'clock.

(Thereupon, at 12:40 o'clock P.M., Court was adjourned.) [119]

Tuesday, December 26th, 1944, at 10:07 o'clock A.M., the following further proceedings were had herein:

The Court:: You had better get my file in this case, too. All right, Mr. Biggs.

Mr. Biggs: We filed a motion, if the Court please, in this Kurth v. Clarke Lumber Company case to amend the findings of fact and the conclusions of law by eliminating from the findings as filed Finding of Fact No. 9 and Conclusion of Law No. 5. Both of those, your Honor, have to do with another state statute that we think is not in issue in this case, nor necessary to the decision of the case.

In Finding of Fact No. 9 is recited the provision of the Code, Section 1-2042, providing that actions may be brought "within six years upon a liability created by statute, other than a penalty or forfeiture." I think that is a correct statement of the fact but it is not, as we contend, in issue here.

Conclusion of Law No. 5 provides, "That this action was brought within the time afforded by Section 1-204 (2) Oregon Compiled Laws Annotated, 1940, the applicable state statute."

The Court: Clerk, the Findings of Fact are what we are interested in, not in the file here. You might search for them. Do you suppose somebody might have them in the recording room?

The Clerk: They might have. [120]

The Court: Go right ahead.

Mr. Biggs: We ask that those, that finding of fact and that conclusion, be eliminated, if the Court please, so that——

The Court: What did the conclusion say?

Mr. Biggs: The conclusion simply recited that the action was brought within the time provided by that Section of the Code, which the conclusion says is "the applicable state statute."

The Court: Well, I would not want to strike that out altogether. I would like to say, at least, that the action was brought within the time provided by law.

Mr. Biggs: That is all right. We have no objection to that. The position that we took was this: That the only issue raised in bar, or the only statute raised as a bar to the maintenance of this action was the special overtime statute of limitations, and if the Court finds that that is not a bar then there is no other statute pleaded as a bar and it is not necessary for the Court to specify what time the action should be brought in. It is sufficient only for the Court to say that the statute that they pleaded as a bar actually is not a bar, and then there is no issue raised as to his right to maintain the action.

The Court: I am not closing my mind until I hear you, Mr. Etling; don't think that; but I just want to get this record pointed up right. I take it that we are all agreed, regardless [121] of pleadings, in this court under the existing practice, under the new Rules of Civil Procedure we take judicial knowledge of the Oregon statutes.

Mr. Biggs: Yes, I think that is true, your Honor.

The Court: That is your understanding, Mr. Morris?

Mr. Morris: Yes.

Mr. Biggs: That is mine, too.

The Court: Now Mr. Etling, what is your feeling about it?

Mr. Etling: Your Honor, we felt at the time we put this in it was necessary to support the judgment, and certainly some statute applies. In all the cases that we have cited I believe that the courts have indicated that a certain statute applied where they have held that another did not apply.

The Court: I wouldn't think I would have to choose, though, between the six-year statute and the three-year statute.

Mr. Etling: Well, in that regard, I have this to say, though: In our original brief, page 3, we cited this *Overnight Motor Transportation Company v. Missel*, 316 U. S. 572, where the Supreme Court of the United States held that actions under 16-B of the Fair Labor Standards Act were not a penalty.

Now since our argument the Circuit Court of Appeals Ninth Circuit, has handed down a decision in the *Culver, et al, v. Bell & Loffland, Inc.*, case, and they have definitely stated—and this same question was raised there—they excluded all claims except those of the three named plaintiffs. [122] The Court proceeded in practical effect to confine the three to the recovery of overtime only, this on the theory that the additional equal amount al-

lowed by the Act for liquidated damages is in reality a penalty.

In respect of these additional amounts the Court, therefore, applied Section 340 of the California Code of Civil Procedure, "which provides a one-year limitation for the commencement of an action upon a statute for a penalty or forfeiture when the action is given to an individual." And that would be the same contention as here, were they trying to invoke the three-year Oregon statute. And the Court goes on to say:

"We think the additional recovery permitted is not in the nature of a penalty. Congress called the amount 'liquidated damages,' and its terminology is entitled at least to some weight."

Then they cite some other cases, one in the Sixth Circuit, and then the leading case of *Huntington v. Antrill*, 146 U. S. 657, and, citing from that case, "Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. Thus a statute giving to a tenant, ousted without notice, double the yearly value of the premises against the landlord, has been held to be 'not like a penal [123] law, where a punishment is imposed for a crime' but 'rather as a remedial than a penal law,' because 'the act indeed does give a penalty but it is to the party grieved'."

The Court goes on to decide in this particular type of case under Section 16-B of the Fair Labor

Standards Act that the remedy is a liability created by statute and it is not a penalty, and they again cite this Overnight Motor Transportation Company v. Missel case.

I think that disposes of the whole question, and I feel that the finding is essential to support our judgment. I think the contentions there were the same, and I think the California statutes were worded in the same language, only the California statutes provided the three-year limitation whereas ours provides six—three in one, and our provides **three in six**.

The Court: This case that Mr. Etling has been reading from is the case of Culver, et al, Appellants, v. Bell & Loffland, Inc., in the United States Circuit Court of Appeals for this Circuit, No. 10,786, decided December 5, 1944, opinion by Judge Healy. I will hand you back this leaflet, Mr. Etling. I see it comes from the Local Law Library and I will be able to get this out of our own Advance Sheets. Will you hand this to him, Mr. Clerk.

Mr. Biggs: Our position in the matter is, your Honor, it is not necessary for us either to argue or decide at this time [124] which of the state statutes is applicable if the special statute is not a bar, because that is the only issue that is raised and that is the only one that was actually argued to your Honor and the only one presented to your Honor for decision. Having found that that is not a bar, there is nothing in the way to the maintenance of this action, and to determine, other than the finding the Court might want to make the con-

clusion that the action, therefore, is brought within the time allowed by law, without at this time and in this case deciding which of the other two state statutes is applicable. I think it would be in the nature of dicta. It is not a matter that we argued to your Honor or submitted to your Honor, and probably will be a matter that at one time or another will be submitted to the Court on filed briefs or on oral argument. We ask simply that the question not be foreclosed by the decision in this case, unless we think it is not necessary to support the judgment.

The Court: Well, I won't try to decide it now. It is the kind of thing that one must not be in too big a hurry about, but I will make an expression or two and then I will ask you and Mr. Morris to send me an order reflecting your view of what the amendment should be.

I am sure that I should not mark up the finding that has been filed with the Clerk. That has passed out of my hands now. I did scratch the one up Mr. Etling submitted [125] to me, which is not uncommon practice, but the original now having passed from my hands it is a public document.

Now, too, under our rules providing for amendment of judgment and amendment of findings of fact on motion made within ten days after the entry of judgment, I take it the proper practice would be either an order denying the motion to amend, which would mean put in my hands, Mr. Etling, or an order amending the findings and conclusions setting forth with respect to your amend-

ments something like this: "Finding of Fact No. 1, heretofore made, is hereby amended to read as follows"; and "Finding of Fact No. Blank, heretofore made, be and the same is hereby stricken", or eliminated, whatever the best verbiage would be.

And likewise as to Conclusions of Law, and then after you sign it file it with the Clerk and it would be in the judgment roll, as we used to call it in the state practice.

We start with the proposition, of course, that nearly always, universally it is not wise but it is the duty of the Court not to decide more than is necessary to the decision. I think that has been tampered with in late years a great deal, but it is still traditional practice and I am inclined to accede, as I am at present advised—I want you to understand I am making full reservation of the right to go the other way; I will have to take counsel with my colleague [126] about the practice question involved, and I need to examine this new decision of our Circuit, but as I feel about it now, which I think was in my mind at the time I was marking Mr. Etling's finding, I struck out one reference there to the six-year statute because it seemed to me that I should not be picking out a section of the statute that was controlling, that not being the question before me. If there were several statutes which had a longer period than the time within which this action was brought, and one of two or one of several could apply, all of them being for a longer term, that would be for somebody else to decide at some other time which one did apply. That would be the ordinary approach

to this question. But there were some broad comments or running talk throughout the trial, which led me to the impression that everybody felt the six-year statute applied if the special legislation of 1943 didn't apply, so I went ahead and signed the finding as to that point in substantially the form submitted by Mr. Etling, and of course if I were to accede to your motion and strike out the reference to the six-year statute nobody could ever claim that I was indicating by that action that I felt the three-year penalty statute applied. I would be doing no more than simply not actually committing myself as to what statute did apply. I am particularly inclined to take this action, although I have a personal and rather fixed view about it. I am particularly inclined to take this action, because I know [127] by experience how difficult the whole field of limitations is. I know that it is an illusive subject.

Some years ago—I am not going to talk at any length now but some years ago I was surprised to find—it happened to be the State of California statute Mr. Etling just referred to—the Supreme Court construed the language “liability created by statute” down there. It doesn't all come back to me clearly now but it had something to do with the very modern law that existed in California up until recent times, that stockholders had an unlimited liability pro rata for debts of an insolvent corporation. That was in their statute; it might even have been in their constitution; and they have only changed that in recent times, either by Constitutional amendment or by statute, I forget which.

But, anyhow, in an attempted relaxation of the rule I am sure that is how it came up in an attempt to restrict that.

The California Supreme Court had to discuss what "liability created by statute" means, and that put me on my guard—that and another experience I won't speak of put me on my guard about this whole field of limitations. In short, it is wise not to say anything more than you need to at any particular time as to what limitation statutes mean, and so my inclination is strongly, because I don't feel that it prejudices the plaintiff's case in any respect, because it seems to me that it accords with my duty in the premises of [128] not deciding anything more than necessary. So my inclination is strongly to grant the amount, and will you send me up what I have asked for today because I am going away. I may take it away with me and decide it after I am gone. Whichever one of you is not the prevailing party in this matter is entitled to an exception, for whatever that means.

Mr. Etling: I would like to call the Court's attention, too, in this regard, that by the motion the defendants moved against Finding of Fact No. 9 and Conclusion of Law No. 5 but they did not move against Conclusion of Law No. 4. Does your Honor have the findings before you? Conclusion 4? You have then gone a little further and stated——

The Court: Yes, I know.

Mr. Biggs: In view of the Court's remarks just

made, I think it could very well be eliminated without prejudice to the defendants. Well, if the Court will permit me to enlarge my motion to amend, I move to amend to include Conclusion 4, although I don't——

The Court: No, you must not get too tangled up. You amend the motion and send up the form of order you think it ought to be in, and if you think it ought to include that No. 4 you include it.

Mr. Biggs: All right.

The Court: But 4 obviously refers to the liability created by the Wages and Hours Act, the Federal statute. [129]

Mr. Biggs: I think so.

The Court: What we were talking about a minute ago is the proper construction of the Oregon limitation statute, about liabilities created by statute, and, having gone as far as we have, I may just get timid and back away from the whole thing. You had just as well be prepared for that. In other words, you may not have got into action soon enough with this idea.

All right, Gentlemen. Thank you.

Mr. Biggs: Thank you, your Honor.

(Thereupon the matter was submitted.) [130]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, hereby certify that I reported in shorthand all of the evidence given and arguments and oral proceedings had upon the trial of

the above-entitled cause before the Honorable Claude McColloch, Judge of the above-entitled Court, on Friday, November 24, 1944, Friday, December 8, 1944, and Tuesday, December 26, 1944; that I thereafter caused my shorthand notes of the evidence given and arguments and oral proceedings had to be reduced to typewriting, and the foregoing and hereto attached 130 pages of typewritten matter, numbered 1 to 130, both inclusive, contain a full, true and accurate record of all of the evidence given and arguments and oral proceedings had upon said trial.

Dated at Portland, Oregon, this 5th day of April, A. D. 1945.

ALVA W. PERSON

Court Reporter. [131]

[Endorsed]: No. 11048. United States Circuit Court of Appeals for the Ninth Circuit. E. H. Clarke Lumber Company, an Oregon corporation, Appellant, vs. P. N. Kurth, Appellee, and P. N. Kurth, Appellant, vs. E. H. Clarke Lumber Company, an Oregon corporation, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the District of Oregon.

Filed April 28, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11048

P. N. KURTH,

Appellee and Cross-Appellant,

vs.

E. H. CLARKE LUMBER COMPANY,

Appellant.

STATEMENT OF POINTS UPON WHICH
APPELLANT WILL RELY ON APPEAL

To the Clerk of the Above Entitled Court:

The record on appeal having been transmitted by the Clerk of the District Court to the Clerk of the United States Circuit Court of Appeals for docketing, the appellant submits herewith its statement of the points upon which it intends to rely upon appeal.

1. The District Court erred in deciding that Chapter 265, Or. Laws, 1943, is not a bar to the maintenance of this action.

2. The District Court erred in deciding that Chapter 265, Or. Laws, 1943, as applied to this action unreasonably interferes with the normal operation of the Fair Labor Standards Act (Title 29, USCA, Section 201 ff.) and therefore violates the United States Constitution in that it unreasonably interferes with the power of Congress to regulate interstate commerce among the several states in a field already occupied by Congress.

3. The District Court erred in deciding that the

ninety-day period prescribed in the savings clause of Chapter 265 is unreasonably short and that Chapter 265 applied to this action is unconstitutional and void.

4. The District Court erred in rendering judgment in favor of plaintiff and against defendant.

5. The District Court erred in refusing to decide that if the ninety day period prescribed in the savings clause of Chapter 265 is unreasonably short as applied to this action, the statute should be so construed as to make the period of six months prescribed in said statute applicable to this action.

R. R. MORRIS

R. N. KAVANAUGH

DAVID L. DAVIES

HUGH L. BIGGS

Attorneys for appellant.

Due and legal service of the within Statement of points upon which appellant will rely on appeal is hereby admitted at Portland, Oregon, this 26th day of April, 1945.

BRUCE CAMERON

By E. BETZ

Attorney for Appellee and
Cross-Appellant.

[Endorsed]: Filed April 28, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLEE AND CROSS - APPELLANT
WILL RELY ON APPEAL.

To the Clerk of the above entitled court:

The appellee and cross-appellant submits herewith his statement of points upon which he intends to rely upon appeal.

1. The District Court erred in finding and concluding that plaintiff is entitled only to \$250.00 as reasonable attorney's fees for the reason that based upon the record, proceedings, and evidence in this case such sum is clearly inadequate.

2. The finding and conclusion of the District Court that plaintiff is entitled to only \$250.00 as reasonable attorney's fees is also inadequate to compensate appellee and cross-appellant for the extra work entailed in this appeal.

Respectfully submitted,

CARL W. ETLING

BRUCE CAMERON

Attorneys for Appellee Cross-
Appellant.

Due and legal service of the foregoing statement of points is hereby accepted at Portland, Oregon this 2nd day of May, 1945, by receipt of a certified copy thereof.

HUGH L. BIGGS

Of Attorneys for Appellant.

[Endorsed]: Filed May 3, 1945. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL TO BE PRINTED

To the Clerk of the Above Entitled Court:

The Record on Appeal having been transmitted by the Clerk of the District Court to the Celrk of the United States Circuit Court of Appeals for docketing, the Appellant hereby designates the following portions thereof to be printed for inclusion in the printed transcript of record herein:

1. Amended complaint, omitting therefrom all of Exhibit A (Pages 1 to 7 inclusive, Exhibit A).

2. Answer to amended complaint.

3. Motion to dismiss answer.

4. Pretrial order.

5. Testimony of the witness, P. N. Kurth. (Transcript pages 3-8).

6. Remarks of Judge in deciding case. (Transcript pages 115-119).

7. Findings of Fact and Conclusions of Law.

8. Motion to amend Findings of Fact and Conclusions of Law.

9. Court's order on motion to amend Findings of Fact and Conclusions of Law.

10. Judgment.

11. Notice of appeal to Circuit Court of Appeals.

12. Notice of cross-appeal.

13. Statement of points upon which appellant will rely upon appeal.

14. Appellant's designation of contents of Record on Appeal.

15. Statement of points upon which Appellee will rely on cross appeal.

16. Appellee's additional designation of contents of record on appeal.

R. R. MORRIS

R. N. KAVANAUGH

DAVID L. DAVIES

HUGH L. BIGGS

Attorneys for Appellant.

Due and legal service of the within Designation of Contents of Record on Appeal is hereby admitted at Portland, Oregon, this 26th day of April, 1945.

BRUCE CAMERON

By E. BETZ

Attorney for Appellee and
Cross-Appellant.

[Endorsed]: Filed April 28, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL PARTS OF
RECORD ON APPEAL TO BE PRINTED

To the Clerk of the Above Entitled Court:

The appellee and cross-appellant hereby designates the following additional parts of the record on appeal to be printed for inclusion in the printed transcript of record herein:

1. U. S. District Court's Order to Clerk to trans-

mit entire Transcript of Evidence and Arguments to U. S. Circuit Court of Appeals.

2. Transcript of Evidence and Arguments November 24, 1944, December 8, 1944, and December 26, 1944, pp. 1-130, plus Index and Reporter's Certificate.

3. Transcript of U. S. District Court Clerk's docket entries.

4. Designation of additional portions of record and proceedings. (By plaintiff cross-appellant.)

5. Additional designation by plaintiff cross-appellant.

Respectfully submitted,

CARL D. ETLING

BRUCE CAMERON

Attorneys for Appellee Cross-Appellant.

Due and legal service of the foregoing designation of record is hereby accepted at Portland, Oregon this 2nd day of May, 1945, by receipt of a certified copy thereof.

HUGH L. BIGGS

Of Attorneys for Appellant.

[Endorsed]: Filed May 3, 1945. Paul P. O'Brien, Clerk.

**In the United States
Circuit Court of Appeals**

For the Ninth Circuit

E. H. CLARKE LUMBER COMPANY,

an Oregon Corporation,
Appellant,

vs.

P. N. KURTH,
Appellee.

Brief of Appellant

E. H. CLARKE LUMBER COMPANY

Upon Appeal from the District Court of the United
States for the District of Oregon.

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FILED

SEP 28 1945

PAUL P. O'BRIEN

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No. 1048

**In the United States
Circuit Court of Appeals**

For the Ninth Circuit

E. H. CLARKE LUMBER COMPANY,

an Oregon Corporation,
Appellant,

vs.

P. N. KURTH,
Appellee.

Brief of Appellant

E. H. CLARKE LUMBER COMPANY

Upon Appeal from the District Court of the United
States for the District of Oregon.

JURISDICTION OF THE COURT

Jurisdiction of the District Court was founded upon Sec. 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C.A. Sec. 216) (R. p. 2) and Sec. 41-8 of the Judicial Code.

Jurisdiction of the Circuit Court of Appeals is founded upon Section 128, as amended, of the Judicial Code (28 U.S.C.A. Sec. 225(a)(1)). This appeal has been taken from a final decision of the District Court of the United States for the District of Oregon within the meaning of Section 128 of the Judicial Code.

STATEMENT OF CASE

This action was instituted by Appellee and Cross-Appellant Kurth, hereafter called Appellee, to recover overtime wages, liquidated damages and attorneys' fees under the Fair Labor Standards Act of 1938. (R. p. 2). Appellee, prior to the institution of the action, had been employed by Appellant Clarke Lumber Company. He was engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act. (R. p. 13). His services for Appellant terminated in September of 1942. (R. p. 14). In March, 1943, the Oregon Legislature, at its general session, legally enacted a statute limiting to six months the time within which action for the recovery of overtime, premium pay or liquidated damages, required or permitted by any statute, might be brought; with the proviso that suits on accrued causes of action must be instituted within ninety days from the effective date of the law. (R. p. 15).⁽¹⁾ The statute carried an emergency clause by virtue of which it became effective upon its passage. The governor approved the statute March 16, 1943. This action was instituted by

(1) Ch. 265, O.L. 1943, Appendix I.

Appellee on February 10, 1944. (R. p. 15). Appellant pleaded the statute of limitations as a bar to recovery. It is admitted that, if the statute does not prevent recovery by Appellee, he is entitled to recover judgment in the amount of \$427.38. (R. p. 18).

The sole question involved is the constitutionality of the Oregon statute of limitations, Chapter 265 Session Laws of 1943. If constitutional, it is admitted that it is a bar to this action. The District Court held, after trial upon the merits, that the statute could not be constitutionally applied to the claim of Appellee because to do so would unreasonably interfere with interstate commerce in that it would constitute an unreasonable interference with the prosecution by Appellee of rights granted him by federal law. (R. pp. 33, 34). The opinion of the Court is found at pages 24-28 of the printed record.

SPECIFICATION OF ERRORS

The District Court erred in the following respects:

1. In holding that Chapter 265 was not a bar to this action.

2. In holding, that the ninety day period within which suit might be instituted upon causes of action accrued at the time of its enactment, was an unreasonably short period for the institution of action.

3. In failing to hold that if the ninety day period were unreasonably short, the six months general period allowed by the statute applied.

4. In failing to hold, that the six months general period allowed by the statute afforded Appellee a reasonable time within which to institute action with the result that the statute is constitutional.

SUMMARY OF ARGUMENT

1. Statutes of limitations are entitled to the same consideration at the hands of the court as are other types of statutes.

- Clementson v. Williams*, 12 U.S. (8 Cranch) 72, 74, 3 L. Ed. 491;
United States v. Wilder, 80 U.S. (13 Wall.) 254, 256, 20 L. Ed. 681;
Bell v. Morrison, 26 U.S. (1 Pet.) 351, 360, 7 L. Ed. 174;
Beatty v. Burnes, 12 U.S. (8 Cranch) 98, 107-108, 3 L. Ed. 500;
Pillow v. Roberts, 54 U.S. (13 How.) 472, 477, 14 L. Ed. 228;
Leffingwell v. Warren, 67 U.S. (2 Black) 599, 606, 17 L. Ed. 261;
Hanger v. Abbott, 73 U.S. (6 Wall.) 532, 538, 18 L. Ed. 939;
Riddlesbarger v. Hartford Insurance Co., 74 U.S. (7 Wall.) 386, 389-390, 19 L. Ed. 257;
Edwards v. Kearzey, 96 U.S. 593, 603, 24 L. Ed. 793;
Campbell v. City of Haverhill, 155 U.S. 610, 616, 39 L. Ed. 280, 15 Sup. Ct. 217;
United States v. Oregon Lumber Co., 260 U.S. 290, 67 L. Ed. 261, 43 Sup. Ct. 100;
McCluny v. Silliman, 28 U.S. (3 Pet.) 270, 278-279, 7 L. Ed. 676;

Campbell v. Holt, 115 U.S. 620, 628, 29 L. Ed. 483, 6 Sup. Ct. 209;

Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348-349, 88 L. Ed. 788; Sup. Ct. 582.

2. The State of Oregon had the power to enact a statute of limitations applicable to cause of action created by federal law as no period of limitation was imposed by Congress.

Judiciary Act of 1787, Sec. 34;

Campbell v. City of Haverhill, 155 U.S. 610, 616, 39 L. Ed. 280, 15 Sup. Ct. 217;

Brody v. Daly, 175 U.S. 148, 44 L. Ed. 109;

McClaine v. Rankin, 197 U.S. 154, 49 L. Ed. 702.

3. The Oregon statute does not offend the due process clause.

(a) Appellee was afforded a reasonable time by the statute within which to institute this action.

Evans v. Finley, 166 Ore. 227, 111 P. (2d) 833;

Ibid Note 14;

Terry v. Anderson, 95 U.S. 628, 633, 24 L. Ed. 365;

Mills v. Scott, 99 U.S. 25, 27, 25 L. Ed. 294;

Antoni v. Greenhow, 107 U.S. 769, 774-775, 27 L. Ed. 468, 2 Sup. Ct. 91.

(b) A period of ninety days from the effective date of the law was ample for the institution of the action by Appellee.

State ex rel., v. Board of Education, 137 Kan. 451, 21 P. (2d) 295—1½ months;

Vanderbilt v. Hegeman, 157 Misc. 908, 284 N.Y.S. 586. In *Bacon et al. v. Howard*, 61 U.S. (20

How.) 22, 15 L. Ed. 811, a 60 day statute was applied, and there was no contention that it was unreasonable;
Crawford v. Hunt, 41 Ariz. 229, 17 P. (2d) 802;
Steele v. Gann, 197 Ark. 480, 123 S.W. (2d) 520;
De Moss and others v. Newton and another, 31 Ind. 219;
Kozisek v. Bringham, 169 Minn. 57, 210 N.W. 622;
Wooten v. Pollock, 116 N.J. Eq. 490, 174 A. 497;
Union County Building & Loan Ass'n. v. Welchek, 12 N.J.M. 847, 175 A. 625.

(c) If there be doubt as to the reasonableness of the ninety day period, then the six month general period applies. That period is a reasonable one within which to start this action.

Koshkonong v. Burton, 104 U.S. 668;
McLaughlin v. Hoover, 1 Ore. 31;
Pitman v. Bump, 5 Ore. 17;
Crawford v. Hunt, 41 Ariz. 229, 17 P. (2d) 802;
Steele v. Gann, 197 Ark. 480, 123 S.W. (2d) 520;
De Moss and others v. Newton and another, 31 Ind. 219;
Kozisek v. Bringham, 169 Minn. 57, 210 N.W. 622;
Wooten v. Pollock, 116 N.J. Eq. 490, 174 A. 497;
Union County Building & Loan Ass'n. v. Welchek, 12 N.J.M. 847, 175 A. 625;
Cummings v. Rosenberg, 12 Ariz. 327, 100 Pac. 810—5 months, 10 days;
Bigelow v. Bemis, 84 Mass. (2 Allen) 496;
Stine v. Bennett, 13 Minn. 153—4½ months.
Horbach v. Miller, 4 Neg. 31—4½ months.

4. The statute does not offend the commerce clause.

(a) Inasmuch as Congress has not fixed a period of

limitations within which actions under the Fair Labor Standards Act must be brought, Congress has consented that claims under the Fair Labor Standards Act may be subjected to the statutes of limitations of the various states.

Cooley v. Board of Wardens of the Port of Philadelphia et al., 53 U.S. (12 How.) 299, 13 L. Ed. 996;

Ex Parte Cox, 127 U.S. 731, 32 L. Ed. 274.

(b) The statute of limitations affecting the remedy and not the right, does not deprive an employee of rights granted by federal law. There is no conflict with the commerce clause.

Campbell v. City of Haverhill, 155 U.S. 610, 39 L. Ed. 280;

Brody v. Daly, 175 U.S. 148, 44 L. Ed. 109;

McClaine v. Rankin, 197 U.S. 154, 49 L. Ed. 702.

5. The Oregon statute does not offend the equal protection clause of the constitution.

(a) The group upon which the statute acts—wage earners—has long been recognized as an appropriate group for legislative classification.

Stettler v. O'Hara, 69 Ore. 519 (1914), Affirmed by equally divided Court 243 U.S. 629, 61 L. Ed. 937.

State v. Bunting, 71 Ore. 259, 243 U.S. 426, 61 L. Ed. 830.

(b) Overtime wages likewise has long been recognized as an appropriate classification for legislative action.

(c) The classification is reasonable.

(d) The statute is not discriminatory against federal rights as it applies to claims for overtime penalty of liquidated damages under any statute, federal or state.

Oregon Laws 1943 Chapter 265.

ARGUMENT

Statutes of limitation are entitled to the same "respect" as other statutes; ⁽²⁾ as "wise and beneficial" ⁽³⁾ statutes of "repose," ⁽⁴⁾ they are founded upon the "sound," ⁽⁵⁾ "wise and salutary" ⁽⁶⁾ policy of the "public needs"; ⁽⁷⁾ they "tend to the peace and welfare of society" ⁽⁸⁾ and are designed to "promote" justice ⁽⁹⁾ by imposing a "salutary vigilance." ⁽¹⁰⁾

(2) *Clementson v. Williams*, 12 U.S. (8 Cranch) 72, 74, 3 L. Ed. 491; *United States v. Wilder*, 80 U.S. (13 Wall.) 254, 256, 20 L. Ed. 681.

(3) *Bell v. Morrison*, 26 U.S. (1 Pet.) 351, 360, 7 L. Ed. 174.

(4) *Beatty v. Burnes*, 12 U.S. (8 Cranch) 98, 107-108, 3 L. Ed. 500;

Bell v. Morrison, 26 U.S. (1 Pet.) 351, 360, 7 L. Ed. 174;

Pillow v. Roberts, 54 U.S. (13 How.) 472, 477, 14 L. Ed. 228;

Leffingwell v. Warren, 67 U.S. (2 Black) 599, 606, 17 L. Ed. 261;

Hanger v. Abbott, 73 U.S. (6 Wall.) 532, 538, 18 L. Ed. 939;

Riddlesbarger v. Hartford Insurance Co., 74 U.S. (7 Wall.) 386, 389-390, 19 L. Ed. 257;

Edwards v. Kearzey, 96 U.S. 593, 603, 24 L. Ed. 793;

Campbell v. City of Haverhill, 155 U.S. 610, 616, 39 L. Ed. 280, 15 Sup. Ct. 217;

United States v. Oregon Lumber Co., 260 U.S. 290, 67 L. Ed. 261, 43 Sup. Ct. 100.

(5) *McCluney v. Silliman*, 28 U.S. (3 Pet.) 270, 278-279, 7 L. Ed. 676;

Pillow v. Roberts, 54 U.S. (13 How.) 472, 477, 14 L. Ed. 228

(6) *Leffingwell v. Warren*, 67 U.S. (2 Black) 599, 606, 17 L. Ed. 261.

(7) *Campbell v. Holt*, 115 U.S. 620, 628, 29 L. Ed. 483, 6 Sup. Ct. 209.

(8) *McCluney v. Silliman*, 28 U.S. (3 Pet.) 270, 278-279, 7 L. Ed. 676.

(9) *Leffingwell v. Warren*, 67 U.S. (2 Black) 599, 606, 17 L. Ed. 261; *Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-349, 88 L. Ed. 788, Sup. Ct. 582.

(10) *McCluney v. Silliman*, 28 U.S. (3 Pet.) 270, 278-279, 7 L. Ed. 676.

The Fair Labor Standards Act of 1938 does not prescribe a statute of limitations applicable to actions brought to enforce rights created by the statute. There is no other federal statute establishing a statute of limitations for this type of action. In the absence of Congressional action fixing a period of limitations, the statute of limitations of Oregon applies to cases instituted in the Oregon District Court.⁽¹¹⁾ The State statute of limitations is a rule of decision in the federal courts within the meaning of the Conformity Act.⁽¹²⁾

In *Campbell v. City of Haverhill*, the court, considering the application of a State statute of limitations to a right arising under the Federal Patent Laws holding that the state statute was a bar to the proceeding, said (p. 616) :

“* * * In creating a new right and providing a court for the enforcement of such right, must we not presume that Congress intended that the remedy should be enforced in the manner common to like actions within the same jurisdiction?

“Unless this be the law, we have the anomaly of a distinct class of actions subject to no limitations whatever; a class of privileged plaintiffs who, in this particular are outside the pale of the law, and subject to no limitation of time in which they may institute their actions * * *. This cannot have been within the contemplation of the legislative power * * *.”

Unless then the Oregon statute is unconstitutional, it must be applied in the instant proceeding. Inasmuch as

(11) Judiciary Act of 1787, Sec. 34.

(12) *Campbell v. City of Haverhill*, 155 U.S. 610, 616, 39 L. Ed. 280, 15 Sup. Ct. 217.

it is admitted that the case was not instituted within the time permitted by the Oregon law, the statute, if constitutional, is a complete bar. We turn to the issue of constitutionality.

The statute has been attacked from many sides. It is contended that it offends the due process clause in that it does not afford a reasonable time within which a plaintiff must institute action; it is urged that it infringes upon the commerce clause in that it deprives the plaintiff of rights granted him by Congress; it is suggested that it falls within the ban of "the equal protection of the laws" clause, in that the statute is discriminatory against rights granted by Congress, and the classification upon which the statute is based is unreasonable.

We submit that the answer to the question: Does the statute allow a reasonable time within which to institute suit, provides the answer to all substantial questions of constitutionality presented in this case.

Considering first the due process clause, it is settled that after a cause of action has arisen competent legislative authority may change the statute of limitations applicable to such causes of action. The legislative authority may shorten a period of limitations covering causes of action in existence at the time such legislative action is taken.⁽¹³⁾ As we have shown above, the Oregon Legislature, insofar as

(13) *McGahey v. Virginia*, 135 U.S. 662, 34 L. Ed. 304;

Terry v. Anderson, 95 U.S. 628, 24 L. Ed. 365;

Atchafalaya Co. v. Williams Co., 258 U.S. 190, 66 L. Ed. 559.

Appellee's rights are concerned, is such a competent authority. It had the lawful power to shorten the statute applicable to Appellee's cause of action although his cause of action was in existence at the time the legislative action was taken.

However, in decreasing the time within which the action must be instituted, a plaintiff must be afforded a reasonable time within which to pursue his remedy.⁽¹⁴⁾ The primary responsibility for the determination of what is a reasonable time is vested, under our form of government, in the legislature.

In *Terry v. Anderson*, 95 U. S. 628, 633, 24 L. Ed. 365, it is said:

"In all such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all circumstances, reasonable. Of that the Legislature is primarily the judge; and we cannot overrule the decision of that department of the government, unless a palpable error has been committed. In judging of that, we must place ourselves in the position of the legislators, and must measure the time of limitation in the midst of the circumstances which surrounded them, as nearly as possible; for what is reasonable in a particular case depends upon its particular facts."

Referring to that case, it was said in *Mills v. Scott*, 99 U. S. 25, 27, 25 L. Ed. 294:

(14) *Evans v. Finley*, 166 Or. 227, 111 P. (2) 833.
Ibid Note 14.

“* * * The question in such cases, the court said, was whether the time allowed was, under all the circumstances, reasonable; and of this the Legislature of the State was primarily the judge, and its decision would not be overruled unless a palpable error had been committed.”

In *Antoni v. Greenhow*, 107 U. S. 769, 774-775, 27 L. Ed. 468, 2 Sup. Ct. 91 it was said:

“* * * In all such cases the question becomes, therefore, one of reasonableness, and of that the Legislature is primarily the judge * * *. We ought never to overrule the decision of the Legislative Department of the Government, unless a palpable error has been committed. If a state of facts could exist that would justify the change in a remedy which has been made, we must presume it did exist, and that the law was passed on that account. * * * We have nothing to do with the motives of the Legislature, if what they do is within the scope of their powers under the Constitution.”

Before giving consideration as to whether the time allowed by the Oregon Legislature for actions to be brought on existing causes of action is sufficient, we will consider the effect of the commerce clause upon the power of the State of Oregon to enact this law. It is admitted that as to matters within its jurisdiction, the authority of Congress is supreme, and that of the State is inferior. Congress, however, did not see fit to include within the Fair Labor Standards Act of 1938 a statute of limitations. Nor is there any other federal law applicable to such a right of action. In the absence of Congressional law, Oregon had

the power to prescribe the period of limitations within which rights created by federal laws must be enforced.⁽¹⁶⁾ The act of inaction by Congress was its consent that the State of Oregon (and all other states) might legislate upon this subject; and, include within the ambit of the Oregon statute, rights created by Congress.⁽¹⁷⁾

If Congress were not of the opinion that the period of limitations should be fixed by the states, it was within its power to preclude state action by including within the law a period of limitation. If there be question about the soundness of this conclusion, the final answer may be found in the fact that Congress now has before it a bill, which if enacted would fix the period of limitation for rights arising under the Fair Labor Standards Act of 1938 or other federal law.⁽¹⁸⁾ This bill recognizes the power of the States to prescribe statutes of limitation as it makes State laws fixing a period shorter than that proposed applicable to federally created causes of action. We submit that, insofar as the commerce law is concerned, the question is solved by the answer to the question: Is the due process clause violated? Congress has consented that Oregon may enact a statute of limitations. By so doing, it has agreed that such statute does not violate the commerce clause, if, otherwise, it be constitutional. The question then is: Was Appellee granted a reasonable time within which to institute this suit?

(16) *Cooley v. Board of Wardens of the Port of Philadelphia et al.*, 53 U.S. (12 How.) 299, 13 L. Ed. 996;

Ex parte Cox, 127 U.S. 731, 32 L. Ed. 274.

(17) *Campbell v. City of Haverhill*, 155 U.S. 610, 39 L. Ed. 280;

Brody v. Daly, 175 U.S. 148, 44 L. Ed. 109;

McClaine v. Rankin, 197 U.S. 154, 49 L. Ed. 702.

(18) H. R. 2788, Appendix II.

Inasmuch as the statute carried an emergency clause, it became effective in accordance with its terms from and after its passage.⁽¹⁹⁾ As to causes of action then in existence, a period of ninety days was allowed for institution of suit. As to causes of action subsequently arising, a period of six months was established. The trial judge concluded that the period of ninety days, applicable to existing causes of action, was unreasonably short. He did not consider whether the six months period afforded a fair opportunity for the institution of a suit.

It is submitted that the period of ninety days within which to institute action upon existing causes of action was a reasonable one. It accorded Appellee ample opportunity to protect his rights.

In the determination of what is a reasonable time, individual cases are not particularly helpful. They do establish controlling principles, but do not furnish an answer to our question. Considering precedents, in the trial court, Appellee cited a number of illustrative cases to prove the statute unconstitutional. We will now consider them.

In the ancient case of *Berry & Johnson v. Bamsdall*, 61 Ky. (4 Mot.) 292, one month was held unreasonable. That case, of course, could not be authority that three months or six months was also unreasonable. However, two cases hold that one month is reasonable.⁽²⁰⁾ *Relyon v. Tomahawk Paper & Pulp Co.*, 102 Wis. 301, 78 N.W. 412, while holding two months to be unreasonable, would not be authority for holding three months or six months

(19) Oregon Constitution Art. IV Sec. 28.

(20) *Mulvey v. Boston*, 197 Mass. 178, 83 N.E. 402;
Randolph v. Springfield, 302 Mo. 33, 257 S.W. 449.

unreasonable. However, two cases hold that two months is reasonable.⁽²¹⁾ Appellee has referred to three cases holding three months to be unreasonable,⁽²²⁾ but six cases hold that three months is reasonable.⁽²³⁾ He cited an ancient case holding that five months is unreasonable,⁽²⁴⁾ but there are four cases holding that five months is reasonable.⁽²⁵⁾

Appellee cited one case and dicta in another to show that six months is unreasonable.⁽²⁶⁾ There are eight cases holding that six months is reasonable.⁽²⁷⁾ It is thus apparent that the overwhelming weight of authority supports Appellant's position.

(21) *State ex rel., v. Board of Education*, 137 Kan. 451, 21 P. (2d) 295—1½ months;

Vanderbilt v. Hegeman, 157 Misc. 908, 284 N.Y.S. 586. In *Bacon et al. v. Howard*, 61 U.S. (20 How.) 22, 15 L. Ed. 811, a 60 day statute was applied, and there was no contention that it was unreasonable.

(22) *Lamb v. Powder River Live Stock Co.*, 8 Cir. 132 Fed. 434;
Parmenter v. State, 135 N.Y. 154, 31 N.E. 1035;
Adams and Freeze v. Keneyer, et al, 17 N.D. 302, 116 N.W. 98—3½ months.

(23) *Crawford v. Hunt*, 41 Ariz. 229, 17 P. (2d) 802;
Steele v. Gann, 197 Ark. 480, 123 S.W. (2d) 520;
De Moss and others v. Newton and another, 31 Ind. 219;
Kozisek v. Bringham, 169 Minn. 57, 210 N.W. 622;
Wooten v. Pollock, 116 N.J. Eq. 490, 174 A. 497;
Union County Building & Loan Ass'n. v. Welchek, 12 N.J.M. 847, 175 A. 625.

(24) *Lewis v. Harbin, etc.*, 44 Ky. (5 B. Mon.) 564.

(25) *Cummings v. Rosenberg*, 12 Ariz. 327, 100 Pac. 810—5 months, 10 days;
Bigelow v. Bemis, 84 Mass. (2 Allen) 496;
Stine v. Bennett, 13 Minn. 153—4½ months;
Horbach v. Miller, 4 Neb. 31—4½ months.

(26) *Blevins v. Utilities, Inc.*, 209 N.C. 683, 184 SE. 517;
Hathaway v. Merchant's Trust Co., 218 Ill. 580, 75 N.E. 1060—6½ months. dicta.

(27) *Wheeler v. Jackson*, 137 U.S. 245, 34 L. Ed. 659, 11 Sup. Ct. 76;
Turner v. New York, 168 U.S. 90, 42 L. Ed. 392, 18 Sup. Ct. 38;
Saranac Land, Etc., Co. v. Comptroller of N.Y. 177 U.S. 318, 44 L. Ed. 786, 20 Sup. Ct. 642;
Tipton v. Smythe, 78 Ark. 392, 94 S.W. 678;
Fitzgerald v. Scovill Mfg. Co., 77 Conn. 528, 60 Atl. 132—6½ months;
Myers v. Wheelock, 60 Kan. 747, 57 Pac. 956;
Russell v. H. C Akeley Lumber Co., 45 Minn. 376, 48 N.W. 3;
Davidson v. Witthaus, 106 App. Div. 182, 94 N.Y.S. 428.

As we have pointed out above, the basic issue is whether Appellee was allowed a reasonable time within which to institute his action. Reasonable is a relative term. Ordinary men may differ as to the proper application of that word. Being relative, only relative answers can be given in most cases. Because of that fact, courts properly do not take sides on such argumentative questions, but say that the only question of which they can take cognizance is one of law. In jury cases, the question of law involved is whether there is any substantial evidence to support the verdict. In constitutional law cases, the question of law is whether an ordinary man could reasonably take the view which the legislature adopted.

Thus in the above quotations when it is said that the legislative decision must be upheld unless it is palpably erroneous, it is meant that the legislative action is immune from judicial action unless the court can say that no ordinary man could reasonably take the view adopted by the legislature. The rule applicable to classifications under the equal protection clauses, as shown *infra*, is whether there is any rational basis for the legislative action taken—which means nothing more than what we have stated previously. If reasonable men might differ on what is a reasonable time, the decision of the legislature must be upheld—otherwise, the court is substituting its judgment on a debatable issue for that of the legislatures. Such action would be a wholly unwarranted interference with the legislative function.

It is difficult in most cases to say that a group of people, theoretically, at least, representing a majority of the

people, have acted unreasonably. For that reason, if there is a state of facts which an ordinary reasonable man could accept as justifying the action taken, the legislative action is upheld, because it is presumed that the legislature acted on that state of facts. Appellant contends that the time prescribed by the statute in question, viewed in the light of the circumstances attending its adoption and tested by the constitutional principles laid down by the courts is entirely reasonable. At least, even when most critically regarded, it remains a subject upon which reasonable men might differ. So considered, its constitutionality is firmly established.

We need not look afar to find a basis to support the legislative action. There have been in effect in Oregon for many years statutes and regulations issued pursuant to limiting the number of hours worked by women and minors, and authorizing recovery of overtime pay for work performed in excess of the stipulated hours.⁽²⁸⁾ In substance, these statutes are akin to the Fair Labor Standards Act and create similar rights of action. With the advent of the Fair Labor Standards Act and the numerous actions brought under it for overtime, there may be found complete justification for the Oregon statute.

In the last few years, the uncertainties of the application of the federal statute have been emphasized. The application of the act to loft buildings was settled in 1942 in *Kirschbaum v. Walling*.⁽²⁹⁾ The application of this

(28) See Appendix III.

(29) 316 U.S. 517, 86 L. Ed. 1638.

statute to commercial office buildings was not settled until 1945, by the decision of the court in the case of *10 East 40th Street Building v. Callus*, 89 L. Ed. (Adv. Ops.) 1244, but compare *Borden Company v. Borella*, 89 L. Ed. (Adv. Ops.) 1240. In view of the vigorous dissent, it may well be questioned whether the construction adopted in that case will be the final one. The evolution of the term production of goods for interstate commerce has not been completed. The twilight zones between the power of Congress and the power of the State are even more hazy and more cloudy than ever before. The Oregon statutes and regulations requiring premium or overtime pay, of course, apply only to work over which the State has control. The federal statute covers the remaining portion of the field. The uncertainties as to coverage, and the practical impossibility of determining coverage at any one time in the disputed field would justify action by the State of Oregon applicable to all cases of overtime or liquidated damages for work performed in excess of the stipulated hours. Such a law was passed. It applies to overtime or premium pay, including penalties required or authorized by "any" statute. By its terms, the statute applies to federal and state created rights.

These uncertainties, as to coverage, impose a terrific financial burden upon employers at large. The federal and state laws permit the accumulation of secret overtime, liquidated damages and penalties. An employer as well as an employee, in all good faith, intelligently advised as to the coverage of the laws, could well conclude that he was not subject to the penalties of the laws only

to be confronted years later with claims for tremendous sums. A statute established by Congress or the State Legislature, which could be applied in such a manner against an employer, who has been lulled into a false feeling of security by the failure of an employee to institute an action, is not fair. The Oregon Legislature well could conclude that claims to enforce rights given by legislation should be enforced promptly. Concluding that an employer, who is required to plan his business in the light of known liabilities, is also entitled to know his liabilities for overtime pay and penalties granted by the Legislature or Congress as a privilege to employees, the Legislature justifiably could decide that claims running back for a period of five years should be brought promptly and disposed of. The Oregon Legislature concluded that these stale claims must be brought within a period of ninety days.

The charge has been made that the Oregon statute was aimed at the Fair Labor Standards Act. The Federal Act and the experiences under it are important but not for the reason advanced by those attacking it. The experiences under the Federal Act with the continuing enlargement of what must be considered hours worked (travel time serves as an example) illustrates the desirability of a special short period of limitations. The Federal Act was the teacher; not the target of the Oregon Legislature. The same problems arise under the Oregon statutes and regulations and justify the legislation.

The Appellee Kurth in the instant case had ample time within which to bring his action. He knew that he had a

claim against Appellant for liquidated damages and overtime. He attempted to enforce that claim by placing it in the hands of the Wage and Hour Division Manager, in Portland, for prosecution. (R. p. 14). His services with Appellant were terminated in September, 1942. This action was instituted in February of 1944, approximately eighteen months thereafter. He had until June of 1943 to bring this action. Surely this period of nine months is not an unreasonable one. No good reason can be suggested why he should have more time. He knew the type of work he was doing. He knew where his employer could be found.

He recognized that he had a claim for overtime under the Fair Labor Standards Act by consulting the Wage and Hour Division in Portland, Oregon. Having consulted the Wage and Hour Division, having employed counsel to prosecute his claim all before the period of the statute of limitations ran, his statement now that he did not have sufficient time within which to institute action against his employer cannot be accepted.

In the foregoing presentation, we have considered only whether the ninety day period allowed by the statute for the institution of action on existing causes of action was reasonable. However, it is clear that if there be uncertainty as to the reasonableness of the ninety day period, Appellee, in any event, had the full six months allowed by statute within which to institute this lawsuit. In *Koshkonong v. Burton*, 104 U.S. 668, it appeared that:

The town of Koshkonong, Wisconsin, issued its bonds in January, 1857, to which were attached interest coupons. The bonds were payable January 1, 1877, twenty years later. The interest coupons which the court in its opinion held to be entire obligations, were due semi-annually, that is the first day of July and the first day of January of each year following issuance of the bonds. No interest coupons were detached after January, 1858.

An action to recover the principal amount of the bonds and of the coupons was commenced in 1880. This was more than twenty years after issuance of the bonds and approximately three years after the maturity date of the bonds. It was twenty-two years after the maturity of the oldest coupons.

When the bonds and coupons were issued, the statute of limitations applicable thereto was twenty years. In 1872, a new statute of limitations was passed providing:

“ ‘No action brought to recover any sum of money, on any bond, coupon, interest warrant, agreement, or promise in writing, made or issued by any town, county, city or village, or upon any installment of the principal or interest thereof, shall be maintained in any court, unless such action shall be commenced within six years from the time when such sum of money *has or shall become due* * * * Provided, that any such action may be brought within one year after this act shall take effect; *provided* further, that this act shall in no case be construed to extend the time within which an action may be brought under the laws heretofore existing.’ ”

The limitation period to which actions on these obligations were subject prior to the passage of the act of 1872 was twenty years, and, at the time of the passage of the new statute of limitations, neither the bonds nor coupons were outlawed. The court on these facts then gave its attention to the effect of the new statute on obligations which were valid and subsisting, at the time it was adopted. It said:

“Of the object of that statute there cannot, it seems to us, be any reasonable doubt. The specific reference to coupons and interest warrants made or issued by towns, counties, cities, and villages, without distinguishing such as are sealed from those unsealed, and the express requirement as to the time within which actions thereon must be brought or be barred, indicates a purpose upon the part of the legislature to reverse the policy which had been pursued, by holders of such securities, of postponing the collection of interest coupons until after the bonds, to which they were annexed, had matured,—a delay which had the effect, in some instances, of compelling municipal corporations to meet, all at once, a large indebtedness, which the legislature intended, at least as to the interest accruing thereon, should be provided for in installments or through a series of years. Whatever considerations, however, may have suggested that legislation, it is clear that its object was such as we have indicated.”

It was contended in that case that the act of 1872 was unconstitutional as impairing the obligation of the contract between the town and the holders of its securities. The objection was based on the proviso that any such action (of the class specified in the act) may be brought (only) within one year after the act took effect. The court said:

“While that proviso is very obscurely worded, its meaning is, that no action to recover money due upon a municipal bond, coupon, interest-warrant, or written agreement or promise, or upon any installment of the principal or interest thereof, whether such obligations were issued before or after the passage of the act, should be maintained, unless brought within six years (not from the passage of the act, but) from the time the money sued for became due; except—and no other exception is made—that when the six years from the maturity of any past-due bond or coupon would expire within less than a year after the act passed, the action should not be barred, if brought within that year. It was undoubtedly within the constitutional power of the legislature to require, as to existing causes of action, that suits for their enforcement should be barred unless brought within a period less than that prescribed at the time the contract was made or the liability incurred from which the cause of action arose. The exertion of this power is, of course, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of an action before the bar takes effect. Whether the first proviso in the act of 1872, as to some causes of action, especially in its application to citizens of other States holding negotiable municipal securities, is or not in violation of that condition, is a question of too much practical importance and delicacy to justify us in considering it, unless its determination be essential to the disposition of the case in hand. And we think it is not. For if the proviso, in its application to some cases, is obnoxious to the objection that it does not allow sufficient time within which to sue before the bar takes effect, and is, therefore, unconstitutional, as impairing the obligation of the contract between the town and its existing creditors, it does not follow that the entire act would

fall and become inoperative. The result, in such case, would be, that the plaintiffs and other holders of the coupons would have not simply one year, but—under the construction we have given to the statutes in force prior to the act of 1872—to a reasonable time after its passage within which to sue. And if a proper construction of that act would give the full period of six years, after its passage, within which to sue upon coupons maturing before its passage, the judgment below cannot be sustained. For this action was not instituted until more than eight years after the passage of the act of 1872. It is, consequently, barred by limitation as to all coupons falling due (and, therefore, collectible by suit without reference to the maturity of the bonds) more than six years prior to its commencement. The bar was complete more than six years before the revision of 1878 took effect, even if that revision should be deemed to have any application to this action. There is no escape from this conclusion, unless we should hold that the legislature could not, constitutionally, reduce limitation from twenty to six years as to existing causes of action. But neither upon principle nor authority could that position be sustained.”

The court thus reached its conclusion by reasoning:

(1.) If a savings clause in an amendatory statute of limitations is unconstitutional, the entire statute does not for that reason necessarily fall, but a construction should be given to the statute which will preserve its constitutionality and yet effectuate the intention of the legislature.

(2.) The statute of 1872 was clearly intended to operate upon causes of action accrued prior to the passage as well as causes of action accruing after its passage.

(3.) This intent is manifest from the words of the statute "within six years from the time when such sum or money *has or shall* become due."

(4.) If the savings clause so construed and applied does not expressly provide an adequate time within which to sue on accrued causes of action, the court will respect the legislative intent and apply the full period of the statute of limitations to accrued causes of action.

(5.) If the full time permitted by the new statute affords a plaintiff a reasonable time in which to institute suit on existing causes of action, the statute is constitutional.

(6.) Plaintiff having failed to bring his action (accrued prior to effective date of the act) within the full time provided by the new statute for action on future accruing cases, may not complain of the shortness of the savings clause, and is barred.

Simply stated the court decided that if the savings clause of new statute of limitations is not valid, (an issue expressly left undecided) the legislature's intention to reduce the time previously provided for action on causes accrued prior to effective date of the new act is not to be frustrated and such causes left unaffected by the new statute, but the new statute is made to operate *prospectively* on such causes; that is from the date that the new statute becomes operative. By so holding no rights are destroyed and no remedies eliminated.

The analogy between the *Koshkonong* case and the case at bar is readily apparent. There, as here, a new statute of limitations was passed, which shortened the time provided for actions on causes of a certain class. There, as here, the statute of limitations in effect when the cause accrued, was superseded by the new act. There, as here, the words of the new statute compelled its application to accrued causes of action as well as accruing causes of action. There, as here, the time expressly prescribed for action on causes accrued prior to the effective date of the statute was materially shorter than the time provided for action on causes accruing thereafter. There, as here, objection was seriously made that the shortness of the savings clause rendered it invalid, and that the entire statute was therefore unconstitutional. There, as here, plaintiff, although the owner of a cause of action which had accrued prior to the passage of the statute, did not bring his action within either the period prescribed by the savings clause or the time prescribed for actions on causes arising in the future.

The analogy is complete, and, we submit, the result should be the same.

The doctrine of the *Koshkonong* case is the law of the State of Oregon. In the early case of *McLaughlin v. Hoover*, 1 Ore. 31, Plaintiff's action was in assumpsit on a promissory note executed October 2, 1845 and due one year after date. The limitation period then in effect was six years. In 1849, after that statute had run approximately three years against plaintiff's cause of action a

new statute was passed repealing the old and providing that actions in assumpsit shall be commenced "within six years after the cause of action shall have accrued."

Again in 1852 a new statute was enacted, also fixing a period of six years within which action must be instituted. This statute did not repeal existing legislation, although the 1849 law did. When the 1849 statute, which was in effect at the time plaintiff's cause of action accrued, was repealed, three years had run against plaintiff's cause of action. Defendant claimed that in computing the time which had run against plaintiff's cause of action, the three years which ran prior to the law of 1849 should be tacked to time which ran after the law of 1849 to provide the bar of the six-year statute. The court held that the act of 1852 did not repeal that of 1849. The terms of the statutes were consistent. It was the duty of the court to construe the two acts together. They "must be taken as one act." Said the court:

"When we look at all our limitation acts, to ascertain the mind of our legislature, we find a repealing clause in the act of 1849, but none in that of 1852. We can only explain the difference in these two statutes by supposing a difference of intention, and a design to let the act of 1849 run against those causes of action upon which it had commenced to operate. We hold, therefore, that the act of 1852 is a mere continuation of the act of 1849, and that both are to be taken, with reference to this case, as one limitation law. Can, then, a bar to this suit be allowed, by computing time before the act of 1849 took effect? 'Shall have accrued', in that statute, is peculiar phraseology, and seems to indicate causes of action then existing. Limitation

laws effect the remedy, and the legislative power has the same right to regulate and restrict remedies upon causes of action in existence as upon causes of action to be created. When the law is made operative *in praesenti*, courts cannot legislate away the effect, and declare that it shall operate only *in futuro*."

The court held that neither the act of 1849 nor the act of 1852 gave plaintiff's cause of action renewed life because the cause of action was subject to the statute of 1849, which allowed six years from the time the cause of action accrued. Inasmuch as three years already had run, plaintiff was allowed only three years after the law of 1849 became effective. The court said:

"We concur with the Supreme Court of the United States in the opinion expressed in the case of *Ross v. Duval*, 13 Pet. 45. The court there says: 'It is a sound principle, that when a statute of limitations prescribes the time within which a suit shall be brought or an act done, and a part of the time has elapsed, effect may be given to the act; and the time yet to run, being a reasonable part of the whole time, will be considered the limitation in the mind of the legislature in such cases.'"

The court found that it was the intent of the legislature that the act of 1849 apply to causes of action which had accrued prior to its enactment. The legislative intent was clear inasmuch as the law of 1849 repealed all existing legislation in conflict with its terms. If the law of 1849 did not apply to existing causes of action, those causes were removed from the bar of any statute of limitation. Obviously the legislature, in enacting a statute of limitation, did not intend to remove a special group of causes

of action (those then in existence) from the operation of the law.

Shortly thereafter the court was again faced with the effect of an amendatory statute of limitation upon existing causes of action.

In *Pitman v. Bump*, 5 Ore. 17, the Oregon Supreme Court had before it for decision a case involving the construction and application of an amendatory statute of limitations. In that case the limitation period in effect when the cause of action accrued was three years. Within approximately seven months after the cause accrued the legislature amended the statute by reducing from three to two years "after the cause of action shall have accrued," the period within which to commence actions. No provision was made for causes accrued prior to and existing on the effective date of the amendment. Plaintiff's action was commenced after the amendment became effective and more than two years (but less than three) after the cause had accrued.

The new statute did not expressly apply to causes of action which had accrued prior to its enactment. The statute differed from the one considered in the *McLaughlin* case in that it did not repeal the existing law but only amended it. Concerned again with the determination of the legislative intent, which of course is the controlling principle in all cases of statutory construction, the court found that the legislature did not intend that the new statute should subject accrued causes of action to its terms.

The legislative intent, and the determination by the court of that intent cannot be too strongly emphasized. In the *McLaughlin* case, the court found that the legislature intended that the statute of 1849 should apply to causes of action which had already accrued. The court was influenced to reach this conclusion by the fact that the new statute repealed existing legislation. In the *Pitman* case, the court found that the legislature intended that the new statute should not apply to existing causes of action. As a result, the existing causes of action remained subject to the terms of the old statute which was not repealed by the Oregon legislature.

Chapter 265, with which we are now concerned, repealed all acts to the extent that they were inconsistent with its terms. Being a repealing statute, the situation before us is more similar to that in the *McLaughlin* case. The legislative intent, that Chapter 265 should apply to causes of action in existence, and upon which the earlier statute operated, is equally clear. The legislature added a savings clause that actions on claims heretofore accrued should be brought within ninety days of the effective date of the law. This clear declaration that the statute applies to accrued causes of action makes it unnecessary to search for a legislative intent. It is equally clear that the legislature thought that six months was an adequate period for the institution of causes of action. The predominant legislative intent was to impose a six months' bar to these causes of action. It is predominant also that existing causes of action as well as future causes of action should be controlled by the statute. The cause of action presented

in this case accrued prior to the enactment of Chapter 265. This action was brought more than six months after the cause of action accrued and more than six months after Chapter 265 became effective.

The bases of the decision of the U. S. Supreme Court are its prior decisions in *Ross v. Duval*, 13 Pet. 62 and *Sohn v. Waterson*, 17 Wall. 596. It is noteworthy that the Oregon court in the *McLaughlin* case, *supra*, expressly concurred "with the Supreme Court of the United States and the opinion expressed in the case of *Ross v. Duval*, 13 Pet. 45."

The real issue in this case then, is not whether the ninety day period for existing causes of action is a reasonable one, but assuming that it is unreasonably short, whether the six months' period is adequate. This question was not passed upon by the trial judge, and nothing in his opinion nor in his comments during the course of the trial indicates his view that the six months period was unreasonably short. (R. p. 27). That question was not answered, because the trial judge, without considering the Oregon cases of *McLaughlin v. Hoover* and *Pitman v. Bump*, *supra*, did not apply the Oregon doctrine that the general period allowed by the statute of limitations applied to existing causes of action if the special period were unreasonably short. In this the trial court erred.

What we have said above justifying, in our opinion, the reasonableness of the ninety day period, applies with even more force to the six months clause.

Oregon long has had a legislative history of relative short periods of limitations for special types of action.

Suits to enforce labor liens and liens on certain chattels are subject to a ten-day limitation period. (Sec. 67-606, O.C.L.A.) Proceedings to revalue estate property and to contest certain elections are barred after thirty days. (Secs. 20-137, 81-1901, O.C.L.A.) Suits to enforce a number of labor liens are barred after six months. (Secs. 67-107, O.C.L.A.) The Legislature, of course, was familiar with these statutes. It must also be presumed that the Oregon Legislature knew that at least twenty-six other states had enacted various statutes of limitation fixing a period of ninety days or less, and that at least thirty-eight states had enacted various statutes of limitation fixing a period of six months or less, and that in nearly all such states, proceedings to enforce various labor liens had been limited to a period of six months or less. Thus enforcement of such liens—rights created by statute—were limited to periods which in some instances were shorter than the one fixed by the Oregon statute. Why is not a statute relating to enforcement of similar rights created by statute valid?

The trial court concluded that the commerce clause was infringed by the Oregon statute because the ninety day period for the institution of suits on existing causes of action was unreasonably short. We have shown that Congress has consented that that State of Oregon may legislate and establish statutes of limitations applicable to causes of action arising under the Fair Labor Standards Act of 1938. We have shown that valid action by the State Legislature does not conflict with the commerce clause of the United States Constitution. It follows inescapably

that inasmuch as Congress has consented that a valid statute may be so applied, there is no conflict with the commerce clause, regardless of the period of time allowed for the institution of suits. To determine whether the period is reasonable, upon which the validity of this statute is dependent, we look not to the commerce clause but to the due process clause. In so doing, we have demonstrated that the Appellee had approximately nine months in which to bring suit upon his cause of action after his employment was terminated and before the ninety day period elapsed. We believe we have demonstrated that the ninety day period applicable to existing causes of action is a reasonable one. If it be unreasonable, or if there be uncertainty as to its reasonableness, most assuredly the full six months period, which Appellee would then be accorded, is amply sufficient. It follows that the trial court was in error, and its decision should be reversed.

Little need be said as to the other charge of unconstitutionality raised by Appellee. It is contended that the equal protection of the law has been violated, in that the classification upon which the statute acts is unreasonable. To this we cannot subscribe. For years, the employment relationship has been recognized as furnishing the proper basis of classification for legislative action. For years, and particularly in Oregon, statutes have been in effect and upheld regulating the hours of work and prescribing overtime penalties for work performed in excess of those hours.⁽³⁰⁾

(30) *Stettler v. O'Hara*, 69 Ore. 519 (1914), affirmed by equally divided Court 243 U.S. 629, 61 L. Ed. 937;
State v. Bunting, 71 Ore. 259, 243 U.S. 426, 61 L. Ed. 830.

The act under which Appellee claims, the Fair Labor Standards Act of 1938, operates upon the very classification which Appellee suggests is unfair. This suggestion that this classification is unfair has no support and should be disregarded.

Respectfully submitted,

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APPENDIX I
"CHAPTER 265
AN ACT

"To limit certain actions or suits filed in any court for the recovery of overtime or other premium pay and penalties thereunder; to provide a saving clause; to repeal any law to the extent it is in conflict therewith; and to declare an emergency.

"Be It Enacted by the People of the State of Oregon:

"Section 1. Recovery for overtime or premium pay accrued or accruing, including penalties thereunder, required or authorized by any statute shall be limited to such pay or penalties for work performed within six months immediately preceding the institution of any action or suit in any court for the recovery thereof; provided, that an action may be maintained within a period of 90 days after the effective date of this act on claims heretofore accrued.

"Section 2. Any law in conflict herewith to that extent is repealed hereby.

"Section 3. It hereby is adjudged and declared that existing conditions are such that this act is necessary for the immediate preservation of the public peace, health and safety; and an emergency hereby is declared to exist, and this act shall take effect and be in full force and effect from and after its passage.

"Approved by the governor March 10, 1943.

"Filed in the office of the secretary of state March 10, 1943."

APPENDIX II

“H. R. 2788

“IN THE HOUSE OF REPRESENTATIVES

“March 27, 1945

“Mr. Gwynne of Iowa introduced the following bill; which was referred to the Committee on the Judiciary.

“A BILL

“To amend title 28 of the United States Code in regard to the limitation of certain actions, and for other purposes.

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 28 of the United States Code, as amended, be further amended by adding a new section to be known as section 793, and to read as follows:

“ ‘SEC. 793. Except as otherwise provided in any action (statute) creating a right of action to recover damages, actual or exemplary, no action under the laws of the United States shall be maintained unless the same is commenced within one year after such cause of action accrued, unless a shorter time be fixed in any applicable State statute; Provided, however, That public actions to recover money damages may be enforced if brought within two years after the cause of action accrued except when the United States is not the real party at interest; Provided further, That the person liable for such damages shall, within the same period, be found within the United States so that proper process thereof may be instituted and served against such person.’ ”

APPENDIX III

OREGON STATUTES AND REGULATIONS
CREATING OVERTIME OR PREMIUM PAY
OR LIQUIDATED DAMAGES

O.C.L.A. 1940 Sec. 102-502 provides:

“No person shall be employed in any mill, factory or manufacturing establishment in this state more than ten hours in any one day, or in sawmills, planing mills, shingle mills and logging camps more than eight hours, exclusive of one hour, more or less, in one day or more than forty-eight (48) hours in one calendar week, except logging train crews, watchmen, firemen and persons engaged in the transportation of men to and from work, and employees when engaged in making necessary repairs, or in the case of emergency where life and property is (are) in imminent danger; provided, however, employees may work overtime not to exceed three hours in one day, conditioned that payment be made for said overtime at the rate of time and one-half the regular wage. The provisions of this section shall not apply to persons employed in the care of quarters or livestock, conducting messhalls, superintendence and direction of work, or to the loading and removal of the finished forest product.”

Sec. 102-323, O.C.L.A.

“No female shall be employed in any manufacturing, mechanical or mercantile establishment, laundry, hotel or restaurant, or telegraph or telephone establishment or office, or by any express or transportation company in this state more than ten hours during any one day, or more than sixty hours in one week. The hours of work may be

so arranged as to permit the employment of females at any one time so that they shall not work more than ten hours during the twenty-four hours of one day or sixty hours during any one week. Provided, however, that the provisions of this section in relation to the hours of employment shall not apply to nor affect females employed in harvesting, packing, curing, canning or drying any variety of perishable fruit, vegetable or fish. Provided further, they be paid time and a half for time over ten hours per day when employed in canneries or driers or packing plants. Provided, also, that piece workers shall be paid one and a half the regular prices for all work done during the time they are employed over ten hours per day."

Sec. 102-304, O.C.L.A. (as amended by Ch. 20, Laws of 1941) authorized the Wage and Hour Commission of Oregon to fix certain standards relating to working conditions, hours of pay, et cetera for minor and women employees.

Sec. 102-313, O.C.L.A. (as amended by Ch. 20, Laws of 1941) authorizes the Commission to promulgate rules and regulations for carrying into effect the provisions of the preceding section.

Pursuant to provisions of these sections, the Wage and Hour Commission has by official order established certain minimum wage and maximum hour standards for women and minor employees in numerous industries not specified in Section 102-323. These orders generally provide that employers may apply to the Wage and Hour Commission for special overtime permits to work em-

ployees longer hours than the specified maximum hours *on condition that the worker receive time and one-half a regular rate of pay for all time in excess of the regular hours.*

Sec. 102-320, O.C.L.A. (as amended by Ch. 20, Laws of 1941) authorizes actions by women employees to recover the minimum wages for the work performed as established by the Commission and attorneys' fees.

No. 11048

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

**E. H. CLARKE LUMBER COMPANY, AN OREGON CORPORATION,
APPELLANT**

v.

P. N. KURTH, APPELLEE

and

P. N. KURTH, APPELLANT

v.

**E. H. CLARKE LUMBER COMPANY, AN OREGON CORPORATION,
APPELLEE**

**APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON**

**BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR
DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS
AMICUS CURIAE**

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United States Department of Labor.

FILED

DEC 11 1945

PAUL P. O'BRIEN,

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DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS
AMICUS CURIAE**

The Administrator of the Wage and Hour Division, United States Department of Labor, is charged with the duty and responsibility of administering and enforcing the Fair Labor Standards Act. Because this case presents a fundamental question of enforcement of the Act the Administrator, with leave of Court, submits this brief as *amicus curiae*.

STATEMENT

Plaintiff-appellee instituted this action on February 10, 1944 (R. 29), under Section 16 (b)¹ of the Fair Labor Standards Act

¹ Section 16 (b) provides: "Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees

of 1938,² to recover unpaid overtime compensation, an equal amount as liquidated damages, and attorneys' fees. The amounts claimed were alleged to have become due during the plaintiff's employment between July 1941 and September 1942 (R. 29). The defendant's answer alleged that the suit was not commenced within the time limit provided by Chapter 265, Oregon Session Laws, 1943 (Labor Code, Sec. 102-607 (b)), which reduced from six years to 90 days on claims theretofore accrued, and to six months on claims thereafter accruing, the period of limitation for suits to recover overtime pay and penalties.

The full text of Chapter 265 reads as follows:

SECTION 1. Recovery for overtime or premium pay accrued or accruing, including penalties thereunder, required or authorized by any statute shall be limited to such pay or penalties for work performed within six months immediately preceding the institution of any action or suit in any court for the recovery thereof; provided, that an action may be maintained within a period of 90 days after the effective date of this act on claims heretofore accrued.

SECTION 2. Any law in conflict herewith to that extent is repealed hereby.

SECTION 3. It hereby is adjudged and declared that existing conditions are such that this act is necessary for the immediate preservation of the public peace, health, and safety; and an emergency hereby is declared to exist, and this act shall take effect and be in full force and effect from and after its passage.

affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

² C. 676, 52 Stat. 1060, 29 U. S. C. sec. 201, et seq.

This law became effective on March 10, 1943.³ The applicable statute of limitation prior to the enactment of Chapter 265 provided a six-year period of limitation as follows: "Within six years, * * * (2) upon a liability created by statute, other than a penalty or forfeiture" (Oregon Compiled Laws 1940, Section 1-204).⁴

The district court held⁵ that "the period of 90 days afforded by Chapter 265 for the maintenance of this action is unreasonably short and that said law as it affects this action is unconstitutional and void for the following reason: That it unreasonably interferes with the normal operation of the Fair Labor Standards Act and thereby violates [the Commerce Clause] of the United States Constitution in that it unreasonably interfered with the power of Congress to regulate commerce among the several States * * *." The court found, therefore, "that this action was brought within the time provided by law" (R. 37) and entered judgment for the plaintiff (R. 38).

The appellant argued in the court below that even though the 90-day limitation should be determined to be unconstitutional, "the entire act does not as a result of that fall" (R. 94). We shall show that the reasons for holding the 90-day savings clause unconstitutional are equally applicable to the six months limitation on accruing and future causes of action.⁶ Since the Administrator is primarily interested in

³ Thus, the action herein was commenced about eleven months after the effective date of the statute.

⁴ The period of limitation for an action on a penalty is from one to three years (Oregon Compiled Laws 1940, secs. 1-206, 1-208). The liability provided by Section 16 (b) is not a penalty. *Overnight Motor Co. v. Missel*, 316 U. S. 572; *Brooklyn Savings Bank v. O'Neil*, 65 S. Ct. 895; *Culver v. Bell & Loffland*, 146 F. (2d) 29 (C. C. A. 9).

⁵ The findings of fact and conclusions of law are recorded at 8 Wage Hour Rept. 69.

⁶ In the absence of a legislative declaration of severability, "the presumption is that the legislature intends an act to be effective as an entirety." See *Williams v. Standard Oil Co.*, 278 U. S. 235, 241-242. It is evident that the 90 days savings clause of Chapter 265 is simply auxiliary to the six months provision and that the two periods are "so mutually connected with and dependent on each other * * * as to warrant the belief that the legislature intended them as a whole." Cooley on Constitutional Limitations, 7th Ed., p. 247; *Mendiola v. Graham*, 139 Ore. 592, 10 P. (2d) 911, 918 (Ore. 1932).

the future application of the statute of limitations, this brief is directed at the six months provisions.

SUMMARY OF ARGUMENT

The Fair Labor Standards Act does not prescribe any period of limitation for suits brought by employees under Section 16 (b) of the Act. Therefore, the applicable valid state statute of limitation admittedly governs.⁷ We will show, however, that this does not mean that a state is free to prescribe a limitation period which discriminates against claims under a Federal statute, or is inconsistent with or interferes with the terms, policies, and enforcement of a Federal statute.

The theory on which the State statutes of limitations apply to rights created by Federal statutes is that the Rules of Decision Act requires the application of "the laws of the several States except where the Constitution, treaties, or states of the United States otherwise require or provide * * *" (28 U. S. C. A. 725 (R. S. 720)). But it is well established that the Rules of Decision Act does not require the application of a State statute which discriminates against Federal claims (*Campbell v. Haverhill*, 155 U. S. 610, 615; *Pufahl v. Parks*, 299 U. S. 217), or which "would be inconsistent with the terms or defeat the purposes of the legislation of Congress" (*Hills v. Hoover*, 220 U. S. 329), or defeat "the assertion of Federal rights" (*Davis v. Wechsler*, 263 U. S. 22, 24); or which is invalid because it does not allow a reasonable period for resort to the courts for enforcement of the class of rights subjected to the limitation (*Campbell v. Haverhill*, *supra*; *Lamb v. Powder River Livestock Co.*, 132 Fed. 434, 439 (C. C. A. 8); *Terry v. Anderson*, 95 U. S. 628, 633).

We contend that Chapter 265 is defective in all these respects, and that it is invalid and unconstitutional as applied to claims under the Fair Labor Standards Act for the following reasons:

⁷ *Campbell v. Haverhill*, 155 U. S. 610; *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390; *Culver v. Bell & Loffland*, 146 F. (2d) 29 (C. C. A. 9); "Employee Remedy Under the Fair Labor Standards Act," by G. W. Crockett, Jr., 1 National Bar Journal 16-29 (July 1941).

(1) It discriminates against Federal claims in violation of Article VI of the Constitution.

(2) It unreasonably interferes with the assertion of Federal rights and defeats the purposes of Federal legislation in violation of Article VI of the Constitution.

(3) It also unreasonably interferes with Federal regulation of interstate commerce in violation of Article I, Section 8, of the Constitution.

(4) The limitation period provided by Chapter 265 is so short as to deprive claimants of a reasonable opportunity to resort to the courts, and thus deprives them of due process of law in violation of the 14th Amendment to the Constitution.

ARGUMENT

I

Chapter 265 discriminates against rights arising under a Federal law in violation of Article VI of the Constitution of the United States

Although Chapter 265 is drafted so as to apply to suits for overtime compensation authorized by any statute, whether State⁸ or Federal, it seems clear that the sole purpose of the State Legislature was to cut short the remedy available to employees under the Fair Labor Standards Act.⁹ Appellant's

⁸ There are two State statutes which may be within the scope of the terms of Chapter 265: O. C. L. A., secs. 102-323, which provides that time and a half should be paid to female employees for time in excess of 10 hours per day in certain industries; and O. C. L. A., secs. 102-502, which provides that employees working overtime in certain industries must be paid time and a half.

⁹ In this respect, the Oregon statute is more adroitly drafted than a similar statute enacted by the Iowa Legislature at approximately the same time. See Chapter 267, Acts of 50th General Assembly of State of Iowa, enacted March 19, 1943. The Iowa statute reduced from five years to six months the limitation period on all claims arising "pursuant to the provisions of any Federal statute where no period of limitation is prescribed." This statute was held invalid in *Elliott v. Morrell & Co.*, 7 Wage Hour Rept. 1012 (S. D. Iowa, 1944), and *Kappler v. Republic Pictures Corp.*, 59 F. Supp. 112 (S. D. Iowa), and was thereafter repealed on March 29, 1945. (S. B. 94 repealing ch. 267, L. 1943.) At the same time a two-year statute was enacted for the recovery of a liability for failure to pay wages. See also

brief in the district court frankly pointed out that "it is no secret that [at] the 1943 session the legislature believed [that] to promote the welfare of the State every concern should be shown for 'business' therein, not only to aid those then engaged in business, but to attract others,"¹⁰ and noted that "the hazards confronting employers" subject to the Fair Labor Standards Act were "very important in 1943 when the legislature met" (dft. br. in dist. ct., p. 28). As part of a general program to offer more favorable conditions to employers, the legislature enacted Chapter 265.

It is evident that the legislature was not concerned with the effect of State laws which allow overtime compensation. The impact of these laws in creating liability for employers is almost negligible. Sections 102-323, Oregon Session Laws, relate to women employees working more than 10 hours a day in harvesting, packing or canning; and sections 102-505, 506, Oregon Sessions Laws, prohibit employment in any manufacturing establishment for more than 10 hours in any one day;¹¹ but permit overtime work not to exceed three hours in one day on condition that payment be made for said overtime at the rate of time and one-half the regular wage.

These statutes are typical State maximum hour laws designed primarily to prohibit completely overtime in excess of the prescribed daily hours rather than to require compensation or to subject employers to financial liability. That these State

Keen v. Mid-Continent Petroleum Corp., 58 F. Supp. 915 (N. D. Iowa), where the court avoided applying the Iowa six months' statute by holding that claims under the Fair Labor Standards Act are contractual in nature.

¹⁰ See defendant's brief in the district court, p. 31. The 1943 session of the State Legislature, as part of the program to make the State more attractive to industry, created a Committee on Postwar Readjustment and Development. See Chapter 63, Oregon Laws, 1943. Among its duties was a mandate "to promulgate a plan or program designed to induce and encourage the establishment of new industries and businesses within the State" (ch. 63, sec. 3 (d)). And see *Automotive News of the Pacific Northwest*, May 1944, p. 8, where in a leading article entitled "Wage-Hour Persecutions Must Be Stopped," it is stated that to protect businessmen from wage restitution demands under the Fair Labor Standards Act, "we joined with other business interests in securing enactment of a law, at the 1943 session of the Oregon Legislature, establishing a limit of six months on suits for overtime pay."

¹¹ Or for more than eight hours per day in sawmills and logging camps.

statutes were not responsible for the passage of the "emergency" limitation statute here in question is evident from the admitted fact that they "have been in effect in Oregon for many years" (see appellant's br., p. 17) without causing any emergency. As appellant's brief plainly if inadvertently indicates, the "emergency" at which the statute is aimed came "with the advent of the Fair Labor Standards Act" (*ibid.*).

The fact that a Federal Statute was singled out for an unreasonably short period of limitation does not appear explicitly in the terms of Chapter 265. However, as the Supreme Court has repeatedly pointed out "In whatever language a statute may be framed, its purpose must be determined by its nature and reasonable effect * * *." *Henderson v. New York*, 92, U. S. 259, 268; *Minnesota v. Barber*, 136 U. S. 313, 319; *Brimmer v. Rebman*, 138 U. S. 78, 82; *Foster Packing Co. v. Hadell*, 278 U. S. 1, 11. A State may not "under the guise of exerting its police powers * * * make discriminations" in contravention of Federal rights or powers. *Brimmer v. Rebman*, *supra*. "For when the question is whether a Federal act overrides a State law, the entire scheme of the statute must of course be considered, and that which needs must be implied is of no less force than that which is expressed." *Savage v. Jones*, 225 U. S. 501, 533.

However normal may be the desire of the State to foster and encourage its local business interests, the law is clear that this cannot be done at the expense of or by discrimination against Federal legislation. As the Supreme Court said in *McKnett v. St. Louis & S. F. Ry.*, 292 U. S. 230, 234, "A State may not discriminate against rights arising under Federal laws." In the *McKnett* case, the Court held unconstitutional an Alabama statute which deprived its State courts of jurisdiction over transitory causes of action arising in other states under Federal law although conferring jurisdiction with respect to transitory causes of action arising under the common law or statute law of other States. Plaintiff brought action in Alabama under the Federal Employers' Liability Act to recover damages for an injury suffered in Tennessee. The Supreme Court held that the plaintiff could not be excluded from the

state courts "because he is suing to enforce a federal act." 292 U. S. at 234. Where the right arises "not from the state law but from the federal * * * the courts of the several states must remain open to such litigants on the same basis that they are open to litigants with causes of action springing from a different source," said the Supreme Court in a more recent case. See *Miles v. Illinois Cent. R. Co.*, 315 U. S. 698, 703, holding that a State court was without power to enjoin a resident citizen from prosecuting or furthering an action under the Federal Employers' Liability Act in a state court of another State which had jurisdiction under the Act. "This is so because the Federal Constitution makes the laws of the United States the supreme law of the land * * *" (*id.* at 703-704).¹² Although four of the Justices dissented from the result arrived at by the majority, the dissenting opinion agreed that the states could not, under the Constitution, discriminate against Federal rights. Mr. Justice Frankfurter, writing the dissenting opinion, pointed out that "Of course, since a federal right is involved, no state court can screen denial of or discrimination against a federal right, under guise of enforcing its local law" (315 U. S. at 721).

While the question of the validity of a discriminatory state statute of limitations has never been before the Supreme Court, its decisions clearly indicate that State statutes of limitations are to be applied to Federal claims only if such statutes are nondiscriminatory. See *Campbell v. Haverhill*, 155 U. S. 610; *Pufahl v. Parks*, 299 U. S. 217. Thus, in *Campbell v. Haverhill*, where the Court upheld the application of the local statute of limitations to a patent infringement action instituted in a Federal court, the Court recognized a different result might be reached with respect to "statutes passed in manifest hostility to Federal rights or jurisdiction," or with respect to statutes "discriminating against causes of action enforceable only in the Federal courts; as if they should apply a limitation of a year to actions for the infringement of patents, while the or-

¹² The pertinent provision of Article VI of the Constitution provides: "This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

dinary limitation of six years was applied to all other actions of tort" (155 U. S. at 615). See also *Pufahl v. Parks, supra*, where the Court upheld the application of a State statute of limitations to an action by the receiver of a national bank against the bank's stockholders to recover on a liability arising under a Federal statute, pointing out that the local statute governed "*if the state does not discriminate against the receiver's claim in favor of others of equal dignity and like character*" and "*provided those laws are nondiscriminatory and operated equally upon all claims of the class to which his belongs*" (299 U. S. at 227). [Italics supplied.]

The statute involved in the instant case does discriminate against Federal rights and was passed in "manifest hostility to federal rights." Claims for "overtime or premium pay * * * required or authorized by the statute" are singled out from all other kinds of statutory claims, from all other wage claims, and from all other claims arising out of employment contracts, and are subjected to a drastically abbreviated limitation period of six months as contrasted with a six-year limitation period applicable to all other actions upon statutory or contractual liability. Included among the claims to which the ordinary limitation of six years applies are a number of claims "of equal dignity and like character"; for example, statutory minimum wage claims, and claims for overtime compensation and premium pay required by employment, or union contracts. Thus employees who have individual contracts, or union contracts, requiring overtime or premium pay, have a six-year period of time within which to institute action on their claims, but employees with no bargaining power who must rely upon the Fair Labor Standards Act would be restricted to the six-months period of Chapter 265.

We submit that this is obviously the type of discriminatory statute the Supreme Court had in mind in indicating the constitutional restrictions upon State action with respect to Federal laws. As we shall show in the following sections of this brief, the discriminatory character of Chapter 265 is particularly objectionable because it substantially defeats the purposes of and interferes with the operation of a Federal statute designed primarily "to aid the unprotected, unorganized, and lowest paid

of the nation's working population" and to protect them "from substandard wages and excessive hours which endanger the national health and well-being and free flow of goods in interstate commerce." *Brooklyn Savings Bank v. O'Neil*, 65 S. Ct. 895, 896.

II

Chapter 265 unreasonably interferes with the assertion of rights provided by the Fair Labor Standards Act and defeats the purposes of that Act, in violation of Article VI¹³ of the Constitution of the United States

"It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or *its benefits denied*, by state statutes or state common law rules. * * * To the federal statute and policy, conflicting state law and policy must yield. Constitution, Art. VI, cl. 2" [italics supplied]. See *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U. S. 173, 176.¹⁴ "The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land." *Kalb v. Feuerstein*, 308 U. S. 433, 439. As stated in an earlier decision of the Supreme Court (*Davis v. Wechsler*, 263 U. S. 22, 24-25):

* * * Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights * * * is not to be defeated under the name of local practice. * * * If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. * * * This is familiar as to the substantive law and for the same reasons it is necessary to say that local practice shall not be allowed to put unreasonable obstacles in the way.

See to the same effect: *Savage v. Jones*, 225 U. S. 501, 533; *McDermott v. Wisconsin*, 228 U. S. 115, 132.

¹³ The pertinent portions of Article VI are quoted *supra*, p. 8, n. 12.

¹⁴ In the *Sola* case the Supreme Court held that the state rules of estoppel would not be applied to preclude a patent licensee from challenging a price

Chapter 265 unreasonably interferes with enforcement of the Fair Labor Standards Act and the assertion of the federal rights provided by the Act in two ways: (1) it places "unreasonable obstacles in the way" of assertion of a remedy intended to insure to the wage earner full reparation for damages caused by the employer's failure to pay on time the statutory wages deemed by Congress essential to "the minimum standard of well-being" (see *Brooklyn Savings Bank v. O'Neil* (65 S. Ct. at 897); and (2) it seriously impairs the deterrent effect which Congress intended the Section 16 (b) liability to exert upon employers.

In a recent decision involving the nature of the right granted by Section 16 (b) (*Brooklyn Savings Bank v. O'Neil*, 65 S. Ct. 895, 896), the Supreme Court pointed out that the purpose of the Act was "to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce," and that the right granted by Section 16 (b) "constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency, and general well-being of workers' [Section 2 (a)] and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well being." *Brooklyn Savings Bank v. O'Neil*, *supra*, p. 902. *Overnight Motor Co. v. Missel*, 316 U. S. 572, at 583. In other words, the right provided by Section 16 (b) "is granted in the public interest to effectuate a legislative policy" (65 S. Ct. at 901), and is a vital part of the basic policy underlying the Fair Labor Standards Act.

"The special nature of the rights of action" (see *Lamb v. Powder River Livestock Co.*, 132 Fed. 434, 442 (C. C. A. 8)) provided by Section 16 (b) of the Fair Labor Standards Act suffices to establish that they are not of a class that can be reasonably singled out to be subjected to a drastically reduced limitation period and that the exceptionally short period pro-

fixing clause where the local rule of estoppel would conflict with the Sherman Act's prohibition of price fixing.

vided by Chapter 265 defeats the purposes of the Federal legislation. As the United States Supreme Court recently observed in the case of *Tennessee Coal, Iron & R. R. Co. v. Muscoda*, 321 U. S. 590, 597: "These provisions [the overtime provisions], like other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. We are not dealing here with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. These are the rights that Congress has specially legislated to protect." "Such a statute," said the Supreme Court, "must not be interpreted or applied in a narrow, grudging manner" (*ibid.*).

The appellant in the district court emphasized the burdens imposed upon employers in complying with the requirements of the Act, which burdens presumably will be more "equitably" allocated as between employer and employee as a result of the new statute of limitations. This argument completely overlooks the fact that a complex statute involving difficult questions of interpretation makes it at least equally imperative that employees be afforded an adequate time to ascertain their rights. Furthermore, by the express terms of the Act the burden of compliance is placed upon the employer. "*No employer shall * * * employ any of his employees * * **" for overtime hours unless such employee receives the specified extra compensation. (Section 7 (a); italics supplied.) In *Overnight Motor Co. v. Missel*, 316 U. S. 572, the Supreme Court specifically held that the circumstances that violations "resulted from an inability to determine whether the employee was covered by the Act" (p. 582) would not justify relieving the employer of the burden and shifting the onus to the employee. The Court said (p. 583):

Perplexing as petitioner's problem may have been, the difficulty does not warrant shifting the burden to the employee. The wages were specified for him by the statute, and he was no more at fault than the employer. The liquidated damages for failure to pay the minimum wages under section 6 (a) and 7 (a) are compensation, not a penalty or punishment by the Government. [Italics supplied.]

Because the employee's right under Section 16 (b) is so basic to the Congressional policy and to the enforcement of the Fair Labor Standards Act, the Supreme Court in the *Brooklyn Savings Bank* case held that an employee could not agree to release that right even though the employer before suit was filed voluntarily paid the minimum and overtime compensation originally due. The same considerations of policy which led the Supreme Court to rule that the employee's right under Section 16 (b) cannot be waived or released, also demonstrate that the sharply reduced limitation period provided by Chapter 265 is in direct conflict with the Federal statute. The imposition of a singularly short limitation period is obviously not consistent with the Congressional purpose that an employee be fully restored for the damage caused by failure to pay on time the statutory requirements deemed essential to "the national health and well-being." It is peculiarly inappropriate to place a short, grudging, limitation period upon a right granted for this purpose.

The second respect in which Chapter 265 contravenes the Federal statute is that it substantially nullifies "the deterrent effect which Congress plainly intended that Section 16 (b) should have" (*Brooklyn Savings Bank v. O'Neil*, 65 S. Ct. 895, 903). The Supreme Court in the *Brooklyn Savings Bank* case pointed out that not only was the right granted by Section 16 (b) compensatory, but it was an enforcement measure which Congress intended should play a major part in securing compliance with the Act. "Although this right to sue is compensatory, it is nevertheless an enforcement provision. And not the least effective aspect of this remedy is the possibility that an employer who gambles on evading the Act will be liable for payment not only of the basic minimum originally due but also damages equal to the sum left unpaid" (*ibid.*). Chapter 265 by so drastically reducing the possibility that "an employer who gambles on evading the Act" will have to pay the full liability, defeats "not the least effective aspect of this remedy."¹⁵

¹⁵ See also n. 16 of the opinion in *Brooklyn Savings Bank v. O'Neil*, 65 S. Ct. at 901: "The provision [Section 16 (b)] has the further virtue of minimizing the cost of enforcement by the Government. It is both a commonsense and economical method of regulation. The bill has other penalties for violations and other judicial remedies, but the provision which I have

That the six months period unreasonably interferes with the purposes of the federal act is apparent not only from "the special nature of the rights of action" but also from "the situation of the parties and other surrounding circumstances." See *Lamb v. Powder River Livestock Co.*, 132 Fed. 434, 442 (C. C. A. 8). It is common knowledge that unorganized workers for whose protection primarily the Fair Labor Standards Act was enacted, are, for the most part, too unformed and too afraid of being discriminated against to exercise their rights. Experience shows that few suits are instituted under Section 16 (b) where employment has not previously terminated. The Supreme Court, in the *Brooklyn Savings Bank* case, expressly took notice of "the unequal bargaining power" of the unorganized, low paid employees. A period as short as that provided by Ch. 265 would bar such employees from recovering not only the liquidated damage amount but also the underpayment of statutory overtime.

Contrary to appellant's contention, it is not the normal or natural thing for such an employee to assert his claim promptly. The worker who needs his job will, in all good faith and without any thought of accumulating liquidated damages, proceed cautiously before asserting his rights. Moreover, frequently the employee, with his inferior resources, is totally unaware that he is entitled to more than his employer is paying him. If the employer's problems are as preplexing as respondents assert, the employee certainly is in no position to have greater knowledge of his rights. He does not have the benefit of continuous advice of counsel, as do most employers, nor does he have access to the records and information which show the

mentioned puts directly into the hands of the employees who are affected by violation the means and ability to assert and enforce their own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the Act." Douglas B. Maggs, former Solicitor of Labor, testifying before Subcommittee No. 4 of the House Judiciary Committee, on July 2, 1945, stated as follows regarding H. R. 2788, 79th Cong., a proposed bill to provide a uniform Federal statute of limitations: "If voluntary compliance with the provisions of the Act lessens as a result of dilution of the effectiveness of the employee suit provision, there will be added pressure on Government to utilize its enforcement powers with a consequent increase in demands for increased appropriations and personnel."

relation of his work to interstate commerce or to the production of goods for interstate commerce, nor does he normally keep records of wages and hours which most employers keep as a matter of business practice or because required by law.

It must be remembered, too, that the employee is not granted the investigatory powers conferred upon the Administrator. Therefore employees frequently await an inspection by the Administrator to determine whether they are entitled to more than has been paid. The Administrator may induce the employer to make reparation voluntarily and thus save the employee the burden of litigating and the risk of inviting retaliatory measures. The employee should have a reasonable opportunity to secure voluntary payment under the auspices of the Administrator. The Administrator's inspection staff, of course, is limited and may not get around to inspecting a particular business more than once in two or three years. Even where there is a complaint or an inquiry, it will frequently require more than six months to arrange and complete an investigation. Thus the six months' limitation period deprives the employee of the assistance of his best, if not his only, source of information regarding his rights. He is entitled to an opportunity to secure this assistance before risking his tenure and relations with his employer by instituting suit.

We submit, therefore, that the same policy considerations which led the Supreme Court to forbid a waiver or release of the employee's rights under Section 16 (b) demonstrate that the extraordinarily short limitation period provided by Chapter 265 defeats the basic purpose of the Fair Labor Standards Act and therefore cannot validly be applied to claims under that Act.

III

Chapter 265 unreasonably interferes with and encroaches upon Federal regulation of interstate commerce in violation of Article I, Section 8 of the Constitution of the United States

A State statute which interferes with a Federal law enacted to regulate interstate commerce, violates not only Article VI,

but also the Commerce Clause¹⁶ of the Constitution. "The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method," said the United States Supreme Court in the case of *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 185. The decisions of the Supreme Court have recognized the invalidity of state legislation which though "nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state." *Id.* at 185-186. Where Congress enacts legislation regulating interstate commerce "local rules * * * will not be permitted to thwart the purposes" of the national regulation. *Sola Electric Co. v. Jefferson Elec. Co.*, 317 U. S. 173; *Chesapeake & Ohio Ry. Co. v. Martin*, 283 U. S. 209, 222; and state legislation which substantially impairs "uniformity in the regulation of the commerce in matters of national concern" (see *California v. Thompson*, 313 U. S. 109, 116) or unreasonably interferes with the "impartial application" of the Federal regulation (see *Southern Ry. Co. v. Reid*, 222 U. S. 424, 442) cannot be sustained. See also *The Minnesota Rate Cases*, 230 U. S. 352, 399-400; *New York Cent. R. R. Co. v. Winfield*, 244 U. S. 147, 153; *Kansas City So. Ry. v. Van Zant*, 260 U. S. 459, 468-469; *Missouri Pac. R. R. Co. v. Porter*, 273 U. S. 341.

It was on this ground that the district court held the 90-day provision of Chapter 265 unconstitutional and void, stating that "It unreasonably interferes with the power of Congress to regulate commerce among the several states * * *" (R. 33-34). We think this ruling applicable to both the 90-day and the six months provision of Chapter 265.

The Fair Labor Standards Act is a statute regulating interstate commerce in a matter of "national concern." The Act establishes "a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities in the United States under labor conditions as

¹⁶The Commerce Clause provides: "The Congress shall have power * * * To regulate Commerce with foreign Nations, and among the several States, * * *."

respects wages and hours which fail to conform to standards set up by the Act." *United States v. Darby*, 312 U. S. 100 at 109. One of its main purposes is "to prevent the use of interstate commerce as a means of competition in the distribution of goods so produced, and as the means of operating and perpetuating such substandard labor conditions among the workers of the several states." *Id.* at 109-110. "The motive and purpose of the * * * regulation are plainly to make effective a congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows." *Id.* at 115. The Supreme Court has recognized that this purpose calls for "equality of treatment" and implies a "Congressional policy of uniformity in the application of the provisions of the Act to all employers subject thereto" (*Brooklyn Savings Bank* case, 65 S. Ct. 895, 902).

Accordingly, a State statute, even though "nominally of local concern," which operates to relieve employers substantially of their liability under Section 16 (b) and thereby to give local employers a competitive advantage over employers in other States, and to deny local employees the full benefits of the national law, conflicts with the national regulation of interstate commerce.¹⁷ Chapter 265, though nominally no more

¹⁷ See *Southern Pac. Co. v. State of Arizona*, 65 S. Ct. 1515, a recent decision of the Supreme Court holding that "the State interest cannot be preserved at the expense of the national interest by an enactment which regulates interstate train lengths * * *." Although the State law was designed to safeguard transportation within the State "the practical effect of such regulation is to control train operations beyond the boundaries of the State * * *. The serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority are apparent." The Court concluded that "the principle that, without controlling Congressional action, a State may not regulate commerce so as to * * * deprive it of needed uniformity in its regulation is not to be avoided by 'simply invoking the convenient apologetics of the police power.'" The court distinguished *South Carolina v. Barnwell*, *supra*, p. 16, on the ground that the regulation affecting interstate commerce in that case was "peculiarly of local concern."

than a local statute of limitations, does thus encroach upon the basic national policies. It is not designed merely to fix an ordinary limitation period; as we have shown, the considerations legitimately bearing on such a procedural matter would not have warranted so drastic a reduction in the period. The consideration which actually influenced the enactment of the reduced period was the State policy to relieve local employers from the full impact of the Fair Labor Standards Act and thus encourage business interests to settle in the State—a policy directly opposed to the manifest and basic policy of the Federal statute. The local objective thus sought is a particularly objectionable encroachment upon national power to regulate interstate commerce. “A chief occasion of the commerce clause was ‘the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.’” If such state action should be sustained, “the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.” See *Baldwin v. Seelig*, 294 U. S. 511 at 522.

It is recognized that the absence of a provision in the Act fixing the limitation period necessarily means some lack of uniformity in the application of the statute because of the varying periods in the applicable State statutes of limitations. However, none of the relevant State statutes in effect at the time of the enactment of the Act provided a period of less than one year. Under the statutes of limitation in effect in most of the States at the time of the enactment of the Act, claims under Section 16 (b) would be regarded as statutory or contractual, subject in most states to limitation periods ranging from three to six years—in the majority of instances six years. (See attached table ¹⁸ showing the limitation periods in the various states on statutory or contractual claims at the time of the enactment of the Fair Labor Standards Act.) While the periods differed somewhat in the different States, the period in every State was at least one year. As the Federal district court in Iowa pointed out, in holding the Iowa six-months statute invalid, it is one thing to apply “the general statute of limita-

¹⁸ Appendix, p. 24.

tion of a State" where the Federal statute provides no limitation period, but it is quite a different matter for the State to undertake affirmatively "to regulate and determine the time when actions may be brought under federal statutes." *Kappler v. Republic Pictures Corp.*, 59 F. Supp. 112, 116-117 (S. D. Iowa). Certainly Congress did not intend to permit the individual States to cut short the rights under the Act so as to secure a competitive advantage for local business, nor can the Rules of Decision Act reasonably be interpreted as authorizing such State action.

IV

Chapter 265 does not allow a reasonable time for claimants to resort to the courts and thus denies employees due process of law in violation of the 14th Amendment to the Constitution of the United States

Although concededly State legislatures have general power to reduce the time for bringing actions on both accrued claims and those which may accrue in the future (*Terry v. Anderson*, 95 U. S. 628), "it is the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought; * * * and a statute that fails to do this cannot possibly be sustained as a law of limitation, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law." *Lamb v. Powder River Livestock Co.*, 132 Fed. 434, 439 (C. C. A. 8). "Perhaps no better rule as to what is a reasonable time can be laid down than that it must be of sufficient duration to afford full opportunity for resort to the courts for the enforcement of the rights upon which the limitation is intended to operate * * *" (*ibid.*). "All statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitation but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions." *Wilson v. Iseminger*, 185 U. S. 55, 62.

Of course, "no one rule as to the length of time as would be deemed reasonable can be laid down for the government of all cases alike. Different circumstances will often require a different rule." *McGahey v. Virginia*, 135 U. S. 662. "What is reasonable in a particular case depends upon its particular facts." *Terry v. Anderson*, 95 U. S. at 633.

The particular facts and circumstances relating to the enforcement of claims under the Fair Labor Standards Act show conclusively, we submit, that the limitation period provided by Chapter 265 is entirely unreasonable. "It is usual in prescribing periods of limitation to adjust the time to the special nature of the rights of action to be affected, the situation of the parties, and other surrounding circumstances," said the Court in the *Lamb* case, *supra*, 132 Fed. at 442. As we have shown in previous sections of this brief, "the special nature of the rights of action" which Chapter 265 so stringently limits, is such as to call for a particularly liberal rather than a grudging allowance. Apart from the Congressional intent that the Section 16 (b) remedy should serve as an enforcement measure in the public interest, "the position of the parties" and other realistic considerations confirm the conclusion that the six-months period is too short for the assertion of such rights. We have previously referred to the problems inherent in the relationship between the parties. The "unequal bargaining power as between employer and employee" and the low-wage employee's dependence upon his job make wholly unwarranted appellant's assumption that cutting short the remedy of employees will prompt a more speedy assertion of wage claims. No realistic appraisal of these circumstances could lead to the conclusion that the limitation period provided in Chapter 265 affords employees a reasonable opportunity to resort to the courts. The fact is that the State legislature did not concern itself with adjusting the time limit to this end, but was concerned with other objectives.

No facts nor any sound reasons have been adduced to support the radical reduction of the limitation period which Chapter 265 imposes. The only argument advanced by the appellant is that employers have difficulty determining their rights under the Act. The difficulties of interpretation under

the Act emphasized by the appellant rather than constituting a justification for the enactment of Chapter 265 support our position that this statute imposes an unreasonable burden on employees in compelling them to ascertain their rights and to become educated to the perplexing problems arising under the Act within the curtailed period.

It is idle to say that because the employee is "pay conscious," he is better aware of his rights than is the employer and should be compelled to act promptly. This argument disregards the realities of the employer-employee relationship and ignores the very considerations which should control in determining what is a reasonable limitation period. For example, as pointed out above, the employee's resources in securing legal advice and information are usually much inferior to the employer's.

Of particular significance is the fact that the six-month limitation period is unusually short for any kind of claim and particularly for any claim comparable to those included in Chapter 265. There is nothing comparable among the various Oregon statutes of limitations O. C. L. A. 1-201 to 1-211), and nothing comparable among the statutes of limitations of any of the other states, except the Iowa statute prescribing a six-months limitation on Federal statutory claims, which has been held unconstitutional and repealed. See *supra*, page 5.

Appellant, in support of the argument that the period provided by Chapter 265 is not unusual or unreasonable, points to a number of statutes of limitations prescribing a six-months period on certain kinds of claims. But the claims covered by such statutes are wholly different in nature from the claims which Chapter 265 covers, and involve entirely different policy considerations. The statutes of limitations cited by appellant all relate to types of claims which long established public policy dictates should be settled or litigated within the shortest possible time after accrual. These statutes fall into a few principal categories according to the dominant public policy which motivates the need for prompt disposal of the particular type of action. (1) The free transferability or alienability of property requires that actions to redeem land sold for nonpayment

of taxes or mortgages shall be promptly instituted.¹⁹ This consideration also governs the statutes providing for prompt settlement of claims against decedents' estates. The provision of short limitations in labor lien laws is partly induced by the desire not to encumber property titles as well as by the consideration that the preferential claim for labor or service is a statutory grant in addition to the basic, separate right to sue for services rendered.²⁰ (2) The security of state and public affairs requires that proceedings to contest elections be brought promptly. (3) The nature of the evidence requires that actions arising out of personal injuries be instituted promptly. See *Canadian Northern Ry Co. v. Eggen*, 252 U. S. 553, 561, where the Court held a limitation of one year not unduly short "having regard to the likelihood of the dispersing of witnesses to accidents * * *, their exposure to injury and death, and the failure of memory as to the minute details of conduct on which questions of negligence so often turn." In addition, the courts point out that complainants in personal injury actions have actual notice of the wrong or injury at the time it is committed and "it is deemed no hardship" to require early suit. See *Lenawee County v. Nutten*, 208 N. W. 613; *Steele v. Gann*, 197 Ark. 480, 123 S. W. (2d) 520; and *Mulvey v. City of Boston*, 197 Mass. 178, 83 N. E. 402, 404. The undersirable social implications of outstanding claims for such personal injuries as libel, slander and alienation of affections have motivated short statutes of limitations. See *Borchert v. Bash*, 97 Neb. 593, 150 N. W. 830.

The circumstances relied upon to justify the short limitations periods for the above types of claims are completely absent with respect to the claims affected by Chapter 265. As we have shown, the public policy considerations as well as all other pertinent considerations relating to claims under the Fair Labor Standards Act are clearly opposed to an unusually short limitation period.

¹⁹ See *Turner v. New York*, 168 U. S. 90; *Saranac Land Co. v. Comptroller of New York*, 177 U. S. 318; and *Moons v. Carter*, 46 N. J. Law 266.

²⁰ See *Bowery v. Babbit*, 128 So. 801, 99 Fla. 1151.

CONCLUSION

The court below correctly ruled that Chapter 265 is unconstitutional and void and does not bar plaintiff's cause of action under the Fair Labor Standards Act.

The judgment below should be ~~reversed~~ *affirmed*.

Respectfully submitted.

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OCTOBER 1945.

APPENDIX

[Statutes of Limitation in Effect in 1938]

Alabama:

Actions founded on promises in writing (not under seal)
6 years (Title 7 #21).

Actions upon any simple contract (Title 7 #21) 6 years
(Code of Alabama 1940).

Arizona: Action upon a liability created by statute, 1 year
(Code of Arizona 1939—#29-201).

Arkansas:

Instruments in writing not under seal, 5 years (#8933).
All other actions not included in other provisions, 5 years
(#8938).

(Digest of Stats. of Ark. 1937).

California: Action upon a liability created by statute, 3 years
(California Code of Civil Procedure, 1937, #338 (1)).

Colorado: All actions of debt founded upon any contract, 6
years (Colorado Stat. Ann. 1935, Ch. 102, #1).

Connecticut:

Contract in writing, 6 years.

Oral contract, 3 years.

(General Stat. of Conn. 1930, Sec. 6005.)

Delaware: Actions of debt, 3 years (Rev. Code of Del. 1935—
#5129).

District of Columbia: Contracts express or implied, 3 years
(D. C. Code 1940 Edition, #12-201).

Florida: Action upon a liability created by statute, 3 years
(Florida Statutes 1941, Title VIII, 95.11).

Georgia:

Statutory rights, 20 years.

Simple contracts in writing, 6 years.

(Georgia Code 1933 (3-704.))

Idaho: Action on liability created by statute, 3 years (Idaho
Code Ann. (1932 Official edition) 5-218).

Illinois:

Actions on unwritten contracts express or implied, 5 years (#16).

Written contracts, 10 years (#17).

(Illinois Revised Statutes 1943, Ch. 83, #16 and 17.)

Indiana:

Contracts in writing, 6 years.

Contracts in writing other than those for the payment of money, 20 years.

(Baldwin's Indiana Statutes Ann. 1934, #61.)

Iowa:

Unwritten contracts, 5 years (subparagraph 5).

Written contracts, 10 years (subparagraph 6).

(Code of Iowa, 1939, Ch. 487, #11007.)

Kansas: Action on liability created by statute, 3 years (General Statutes of Kansas (Ann.) 1935, #60-306).

Kentucky: Action on liability created by statute, 5 years (Kentucky Rev. Statutes 1942, 413.120).

Louisiana: Actions of workmen, laborers, and servants for the payment of their wages, 1 year (La. Civil Code Ann. 1932, Art. 3534).

Maine: Actions on contract, 6 years (Maine Rev. Stat. 1930, Ch. 95, Sec. 90).

Maryland:

Action on a specialty, 12 years.

(Maryland Ann. Code, 1939; Article 57, #1.)

Massachusetts: Actions of contract founded upon contract or liability express or implied, 6 years (General Laws of Mass. 1932, Ch. 260, Sec. 2).

Michigan: All personal actions, 6 years (Compiled Laws of Mich. 1929, #13976).

Minnesota: Action on liability created by statute, 6 years (Minn. Stats. 1941, Vol. 2, Ch. 541.05).

Mississippi:

All actions for which no other period of limitation is prescribed (covers written contracts), 6 years.

Any unwritten contract, express or implied, 3 years.

(Miss. Code 1942 Ann., #722 and #729.)

Missouri: Action upon a liability created by statute, 5 years (Revised Stats. of Mo. 1939, #1014).

Montana: Action on liability created by statute, 2 years (Montana Rev. Code 1935, #9033).

Nebraska: Action on liability created by statute, 4 years (Revised Stats. of Neb. 1943, Ch. 25, 206).

New Hampshire:

Contracts under seal, 20 years.

All other personal actions, 6 years.

(Revised laws of New Hampshire, 1942, Ch. 385.)

New Jersey: Actions in the nature of debt founded upon contract, 6 years (Rev. Stats. of New Jersey 1937, 2: 24-1).

New Mexico:

Contract in writing, 6 years (#27-103).

Unwritten contracts, 4 years (#27-104).

(Stats. of New Mexico, 1941 Ann.)

New York: Liability created by statute, 6 years (Cahill's N. Y. Civil Practice Act (7th Ed.), section 48 of the New York Civil Practice Act).

North Carolina: Actions upon a liability created by statute, 3 years (Gen. Stats. of N. C. 1943, #1-52).

North Dakota: Action on right created by statute, 6 years (Revised Code of N. D. 1913, Sec. 7375).

Ohio: Contract not in writing or action on liability created by statute, 6 years (Throckmorton's Ohio Code Ann. 1940, #11222).

Oklahoma: Action on liability created by statute, 3 years (Stats. of Okla. 1941, Title 12, #95 (2d)).

Oregon: Action upon a liability created by statute, 6 years (Oregon Compiled Laws Ann. 1940, #1-204).

Pennsylvania: Actions of debt grounded on contract, 6 years (Purdon's Pennsylvania Stats. 1936, Title 12, #31).

Rhode Island: All actions of debt founded upon any contract, 6 years (General Laws of Rhode Island 1938, Ch. 510, Sec. 3).

South Carolina: Actions on liability created by statute, 6 years (Code of Laws of South Carolina 1942, #388).

South Dakota: Actions upon liability created by statute, 6 years (S. D. Code of 1939, 33.0232).

Tennessee: Actions on contracts, 6 years (Code of Tenn. 1932, #8600).

Texas:

Actions for debt where the indebtedness is founded upon any contract in writing, 4 years (Article 5527).

Actions for debt where the indebtedness is not evidenced by a contract in writing, 2 years (Article 5526).

(Vernon's Texas Stat. 1936.)

Utah:

Written contracts, 6 years (104-2-22).

Contracts not in writing, 4 years (104-2-23).

(Utah Code Ann. 1943.)

Vermont: Actions on contract, 6 years (Public Laws of Vermont 1933, Sec. 1648).

Virginia:

Contract in writing but not under seal, 5 years.

Oral contract, 3 years.

(Virginia Code of 1942—Title 57, Ch. 238, #5810.)

Washington: ²¹

Action on contract in writing, 6 years (#156).

Action on contract not in writing, 3 years (#159).

(Remington Revised Stats. of Wash. Ann. 1932, Title 2, Ch. 3.)

West Virginia:

Contracts in writing, 10 years.

Oral contracts, 5 years.

(Official Code of W. Va. 1931, Ch. 55—Article 2; #6.)

Wisconsin: Action on liability created by statute, 6 years (Wis. Stats. 1943, Ch. 330.19).

Wyoming:

Contracts in writing, 10 years (89-409).

Actions on liability created by statute, 8 years (89-410).

(Wyo. Rev. Stats. 1931.)

²¹ However, see *Cannon v. Addison Miller*, 9 Labor Cases 62, 546, where the Washington Supreme Court applied the two-year catch-all statute since the State had no statute of limitations in actions for liabilities created by statute.

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**In the United States
Circuit Court of Appeals**

For the Ninth Circuit

E. H. CLARKE LUMBER COMPANY,
an Oregon Corporation,
Appellant,

vs.

P. N. KURTH,
Appellee.

**REPLY BRIEF OF APPELLANT,
E. H. CLARKE LUMBER COMPANY TO BRIEFS OF
APPELLEE AND THE ADMINISTRATOR OF
THE WAGE AND HOUR DIVISION**

**ANSWER OF CROSS APPELLEE TO BRIEF OF
CROSS APPELLANT**

Upon Appeal from the District Court of the United
States for the District of Oregon.

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NO. 1048

**In the United States
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E. H. CLARKE LUMBER COMPANY,
an Oregon Corporation,
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**REPLY BRIEF OF APPELLANT,
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APPELLEE AND THE ADMINISTRATOR OF
THE WAGE AND HOUR DIVISION**

Upon Appeal from the District Court of the United
States for the District of Oregon.

While placed within different frames and presented from varying positions, the brief of Appellee and that of the Administrator of the Wage and Hour Division raise substantially identical objections to the constitutionality of Chapter 265, Oregon Laws of 1943.

It is noteworthy that each admits that inasmuch as the Fair Labor Standards Act does not prescribe any period

of limitations for suits by employees, the applicable valid state statute of limitations governs (Administrator's Br. p. 4, Appellee's Br. p. 4).

The arguments of both revolve around the focal charge that the Oregon Legislature intended to discriminate against rights created by Federal law, and that such an action would be unconstitutional. The Administrator contends that based upon this assumption, the Act falls within the ban of Article VI of the United States Constitution declaring the Constitution and laws of the United States the supreme law of the land.

Again when it is charged that the Oregon statute interferes with the regulation of interstate commerce, it is urged once more that the action was aimed at federal rights. The bases of the arguments presented by Appellee on these points are the same. We submit that they are without foundation.

The Administrator, to support his position, refers to an article published in 1944, after the enactment of the law, in the trade publication "Automotive News of the Pacific Northwest". The Administrator assumes to read in retrospect the minds of the Oregon Legislators when they considered and adopted this law. He claims to know that the Oregon Legislators intended to take away from employees rights given by the federal government under the guise of enacting a statute of limitations. He asks the Court to transgress upon forbidden fields.

In *Stephenson v. Binford*, 287 U. S. 251, 276, 77 L. Ed. 288, 301, involving the use of public highways by contract

carriers, the Court ruled that the state, which owned the highways, could require those using the highways for profit to comply with the regulatory features of the law. But, it was urged that the motive of the state legislature was not to control the use of public highways but some secret, ulterior purpose. To this charge the Supreme Court answered:

“If the legislature had other or additional purposes, which, considered apart, it had no constitutional power to make effective, that would not have the result of making the act invalid.”

This doctrine, based upon the doctrine of separation of powers, was adhered to and clearly applied in *Sonzinsky v. United States*, 300 U. S. 506, 517, 81 L. Ed. 772, 775. The defendant, convicted of dealing in firearms without paying the tax required by the National Firearms Act, contended that the statute was unconstitutional as Congress actually intended to suppress trade in firearms, a power which it lacked, and not to levy a tax, a power admittedly possessed by Congress. The Court bluntly rejected his argument. Said the Court:

“Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts. (Citing cases.) They will not undertake by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution.”⁽¹⁾

(1) These principles likewise were applied in, *United States v. Darby*, 312 U. S. 100, 115, 85 L. Ed. 609, 617; *Ellis v. United States*, 206 U. S. 246, 256, 51 L. Ed. 1047, 1053; *Hampton Jr. & Co. v. U. S.*, 276 U. S. 394, 412, 72 L. Ed. 624, 631; *Calder v. Michigan ex rel Ellis*, 218 U. S. 591, 598, 54 L. Ed. 1163, 1167; *Arizona v. California*, 283 U. S. 423, 455, 75 L. Ed. 1154, 1166.

Apart from these considerations, the charge of discriminatory action by the Oregon Legislature cannot be supported upon the facts. As we pointed out in our Opening Brief, there are in Oregon several statutes requiring or authorizing the payment of overtime pay. Two of these, O.C.L.A., Secs. 102-323 and 102-502, are recognized by the Administrator. In addition such pay is authorized by the statute creating the Wage and Hour Commission of Oregon and authorizing it to fix wages and working conditions for female and minor employees, O.C.L.A., Sec. 102-323. Pursuant to the provisions of this last mentioned statute, the Wage and Hour Commission has issued numerous regulations requiring the issuance of working permits and requiring the payment of overtime.

The Oregon Legislature knew of the existence of those statutes. It is true that those statutes had been in effect for years and, the legislature did not deem that a statute of limitations, applicable to suits to recover overtime, was needed. However, with the advent of the Fair Labor Standards Act, the evils arising under those statutes were brought to the foreground. The Oregon Legislature knew that there was a dividing line between the employees covered by the state law and those covered by the federal law. It knew also that in many instances the dividing line is not a clear one, it is cloudy. Neither an employer nor an employee could know whether his employment and his rights for overtime were controlled by state or by federal law. These uncertainties were heightened by the construction placed by the Supreme Court upon the Fair Labor Standards Act extending its coverage to travel time and to activi-

ties which had not been considered in interstate commerce or necessary for the production of goods for interstate commerce. These difficulties are not confined to the operations of the Fair Labor Standards Act. What is work time under the Fair Labor Standards Act, may well be considered work time under the Oregon laws and regulations. A determination of what is intrastate commerce or what is not necessary to produce goods for interstate commerce limits the scope of the Oregon regulations.

Faced with these uncertainties and with these common problems, the legislature well could, and did conclude, that a statute of limitations applicable only to this type of pay should be adopted. The fact that knowledge was gained from experience under the Fair Labor Standards Act did not restrict the power of the Oregon Legislature.

The Administrator and the Appellee again, and again, cite the familiar principle that a state may not, under the guise of asserting its police powers, discriminate in contravention of federal rights and powers. With that principle, we have no quarrel. We fail, however, to see the similarity of a statute prohibiting the importation of meat for sale into a state (*Brimmer v. Rebman*, 138 U. S. 78), to a statute fixing a period of limitations for the institution of suits to collect overtime, whether the overtime be authorized by federal or by state law. The type of discrimination which is banned by the Constitution is clearly illustrated by the case of *McKnett v. St. Louis & San Francisco Railway*, 292 U. S. 230, in which the court held that a state could not deny to a plaintiff the right to sue in a

state court under the Federal Employers' Act while permitting the plaintiff to sue on all other types of action. Such a statute affects the right. The Oregon statute affects the remedy.

We are here not concerned with denial of access to the courts or denial of the right to justice, but with a statute which invites an aggrieved party, and attempts to induce him, to take prompt action to secure redress.

The Administrator seeks to find discrimination against "Federal Rights" in the fact that a different period of limitations applies to causes of action for wages paid under contract. He contends that, because a longer period applies to contractual causes of action, Chapter 265 is invalid. Again we find it impossible to follow him. The distinction between statutory and contractual causes of action, affording a basis of classification for legislative purposes is well supported by the list of statutes set forth as an appendix to the Administrator's Brief. The lists clearly show the generally recognized principle that statutory differ from contractual causes of action. The Administrator's argument, if it be accepted, proves too much. The overtime itself involved in this case is a creature of statute. If that subject matter does not afford a basis for reasonable classification, the statute creating the right to overtime is of doubtful validity. If the legislature may recognize that statutory overtime is a class unto itself, why then, is not a statute concerned only with the enforcement of such a cause of action equally fair and reasonable?

Both the Administrator and Appellee claim to find the invalidity of the statute in the charge that it interferes with the administration of the Fair Labor Standards Act and defeats the purposes of that law. Both claim it deprives an employee of the fair opportunity to have an administrative finding upon his right to overtime pay. In addition the Administrator claims the deterrent effect of Section 16 (b) of the Act is defeated by this statute of limitations. Neither charge is supported by the Act. Congress in enacting the statute provided three independent methods to enforce its provisions. Section 16 (a) makes a violator of certain provisions of the law, upon conviction, subject to fine, imprisonment or both. Section 16 (b) authorizes employee suits. Section 17 permits the Administrator to bring injunction proceedings to restrain violations of certain features of the law. Nowhere is the exercise of one remedy conditioned upon another. Nowhere is the right of an individual employee dependent upon action or non-action by the Administrator. Nor does the statute, in any way condition the exercise by the Administrator of his powers under the Act upon the action or non-action of an individual. Three enforcement powers, each independent of the other, were established by Congress. *Brooklyn Savings Bank v. O'Neill*, 65 Sup. Ct. 895.

The argument therefore that the functioning of the entire Act is frustrated by the limitation of time within which to enforce but one of the several independent remedies furnished by the Act is deceptive and misleading. Particularly is this so when it is remembered that as to the one means of enforcement affected by the Oregon statute, Congress has implicitly consented thereto.

It is urged that the complexities inherent in the statute, its application and construction, making it difficult for an employee to determine his rights, render the Oregon statute unconstitutional. The argument proves too much. If the Administrator's and the Appellee's position in this respect is sound, no state statute of limitations could apply. But both admit that a state statute of limitations fixes the time within which suit must be instituted under the Act. If the argument is sound, the question arises as to what period would be a reasonable one. The Administrator suggests two or three years (Br. p. 15), but he also admits the applicability of the Arizona one year statute. The Act was passed in 1938. It was not until 1945, seven years later, that we knew that a claim for liquidated damages could not be waived. *Brooklyn Savings Bank vs. O'Neill*, supra. It was not until 1945 that we knew (we still are not sure) that the Act did not apply to commercial office buildings. There are still questions unsettled. What is work time? Are employees traveling to and from work in logging camps working within the meaning of the Fair Labor Standards Act? An action involving this question is now pending. It is on appeal to this Court. *Walling v. Smith Wood Products Company*. Must a state wait until the answers to these problems are found before a statute of limitations may have an effect? Is it not sounder to recognize the desirability of an early determination of these problems? Is it not sounder to prescribe a shorter period of limitations, which, in effect forces litigation which will put an end to the complexities of which the Administrator complains?

A statute of limitations of one, two, four or even six years no more provides a solution to these difficult ques-

tions than does one of six months. Seven years after the Act was passed and became effective we now find questions facing us more difficult to solve than those which arose immediately after its enactment. The cure is not in a longer period of limitations, delaying final interpretation of the Act. Rather it is in one forcing prompt action on the part of those claiming to be aggrieved.

The Administrator, as well as Appellee, likewise contends that the administration of the Act is interfered with because an employee, fearing reprisals at the hand of his employer, will not sue to collect his pay until employment is terminated. If this argument is sound (an assumption we do not accept), then the only statute of limitations which the Administrator would recognize as valid, would be one permitting an employee to sue within a specified period after his employment had been terminated. But the Administrator admits a one year statute or a two year statute is valid. The position of the employee, insofar as employer reprisals may be involved, is the same whether he has six months, one year, two years or six years within which to sue. If reprisals are to be inflicted, it is not the time within which the employee sues that induces reprisals. It is the fact that suit is instituted. It is immaterial whether suit be instituted in six days, six months, or six years. The arguments of the Administrator and of the Appellee miss completely the point.

The Administrator and the Appellee complain that forcing the employee to sue within six months denies him access to investigations made by the Administrator's staff. It is claimed that a six months period is too short, as the

Administrator may not make his investigation more frequently than once every two or three years. Again we must confess we are not persuaded by the argument. If the Administrator is as solicitous of the rights of employees as he now appears to be, better service could be done to the workers by more punctual performance of his duties than by asking a longer period of time within which to delay action.

THE COMMERCE CLAUSE

The Appellee and the Administrator point to the familiar doctrine that the commerce clause forbids discrimination against interstate commerce, that State rules will not be permitted to thwart the process of Congressional legislation under the commerce clause. It is then pointed out that the subject matter of the Fair Labor Standards Act is a matter of national concern. The Act, so they say, embodies a comprehensive scheme to prohibit shipment in interstate commerce of products manufacture under substandard labor conditions. All employers are entitled to equality of treatment. From these premises the conclusion is drawn that inasmuch as the Oregon Act is shorter than statutes of other states, there is a lack of uniformity among the state statutes of limitations rendering the Oregon Act unconstitutional. However, it is admitted that each state has the power to prescribe its own period of limitations. It is admitted that the periods prescribed by the various states differ widely. It is admitted by the Administrator that the one year Arizona statute is valid. He points to other states with six year periods of limitations. These

admittedly valid statutes cannot be supported if the position of the Administrator is sound. Uniformity cannot be achieved by permitting forty-eight states to legislate upon the same subject matter. It is true that Congress, as the Supreme Court said in the *Brooklyn Savings Bank case*, achieved some uniformity throughout the United States as to minimum wages rates and overtime provisions. However, Congress did not intend complete uniformity. It destroyed uniformity by exempting various types of industries, such as seamen, carriers subjected to the control of the Interstate Commerce Commission, seasonal industries, agriculture, and the first processing of certain products from the overtime provisions of the Act. By permitting states to prescribe their own statutes of limitations, Congress recognized that nation-wide uniformity in this particular field was not as desirable as the adaptation of the Fair Labor Standards Act procedurally to the local laws of the various states. By so doing, Congress preferred that within each of the states, employee suits under the Fair Labor Standards Act might be enforced uniformly and consistently with actions under State laws of a like character. The complaint of the Administrator and of the Appellee is not to the Oregon Legislature. It is aimed at Congress.

The Administrator and the Appellee speak glibly of statutes burdening interstate commerce, referring to *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177. The Court there held that the South Carolina statute regulating the weight and width of motor trucks using state highways did not unconstitutionally burden inter-

state commerce. The decision is of value for the opinion discloses what is meant by legislation "aimed at interstate commerce" or "is a means of gaining a local benefit by throwing the attendant burdens on those without the state." Said the Court:

"But the present case affords no occasion for saying that the bare possession of power by Congress to regulate the interstate traffic forces the states to conform to standards which Congress might, but has not adopted . . .

". . . The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse.

* * * * *

"In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.

". . . When the action of a Legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom, and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision. . . . This is equally the case when the legislative power is one which may legitimately place an incidental burden on interstate commerce. It is not any the less a legislative power committed to the states because it affects interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment.

“ . . . The fact that many states have adopted a different standard is not persuasive. . . . The Legislature, being free to exercise its own judgment, is not bound by that of other Legislatures.”

The Oregon statute meets these tests. It applies equally to State as well as Federal rights. There is no discrimination.

The Administrator also refers to a statute which “unreasonably interferes with the ‘impartial application’ of the Federal regulation” citing *Southern Railway v. Reid*, 222 U. S. 424. (Br. p. 16). He misconceives the effect of that decision. The Court there was concerned with a state law imposing a penalty upon railroads refusing to accept goods for transportation. The Court held the State law invalid because it conflicted with the Federal statute. The State law was not unconstitutional because it prevented the “impartial application” of the Federal statute, but because it was in direct conflict with it.

The Court did not hold there must be impartial application of Federal laws. It held that Congress, desiring impartial application of rates of railroads preempted the field. This is clear from the following excerpt from the opinion:

“By these provisions Congress has taken possession of the field of regulation, with the purpose, which we have already pointed out, to keep under the eye and control of the Commission the rates charged and the action of the railroad in regard to them, to secure their reasonableness and to secure their *impartial application*. The statute of North Carolina conflicts with

these requirements. What they forbid the carrier to do the statute requires him to do, and punishes disobedience by successive daily penalties." (Italics supplied.)

If Congress, desiring "impartial application" of statutes of limitation to rights created under the Fair Labor Standards Act, had fixed such a period, the case cited would support the Administrator. But Congress did not establish such a period. It did not seek "impartial application" of statutes of limitation. There is no conflict between the State and Federal laws.

There is no interference with commerce if a reasonable time is afforded an employee within which to bring suit. The time is reasonable if it does not fall within the ban of the due process clause. Congress permitted state laws with their lack of uniformity to apply to these causes of action. Having submitted these causes of action to State action, there can be no complaint, if a State, such as Oregon, acts.

A REASONABLE TIME WITHIN WHICH TO SUE

We are in no dispute with the Administrator, or with the Appellee, that, under the due process clause, an employee must be afforded a reasonable time within which to institute action. To support their claims that the period is unreasonable, the Administrator summarizes points advanced to support their position attacking the statute upon other grounds. He refers again to his assumption that Congress did not intend that a six months statute should apply.

If Congress did not so intend, it would have been easy for Congress to write its own period of limitations into the statute. Once more reference is made to the employee's fear of reprisals if suit is instituted. That fear exists whether the statute is six months or six years. If it be assumed that there will be reprisals, it is the suit that stimulates them, not the time within which the suit must be brought. Again mention is made of the uncertainties as to the application of coverage of the Act. If we must await final determination of the questions which arise under the Act, then we may safely say that no existing State statute of limitations is valid. The Administrator points out that short periods of limitation for the enforcement of labor liens, in his opinion are no guide for the determination of our problem. However, in the labor lien cases, as in this and other cases involving statutory overtime, an added right is given by statute to an employee in addition to his common law right to recover compensation. The right of the employee is a gratuity given to him by a legislature in the belief that, by so doing, the general welfare better will be served. Such a right bears no relation to his common law claim for compensation. It may well be subjected to a different and a vastly shorter period of limitations.

CONCLUSION

We submit that the issues involved in this case are simple, are not new, and should be so considered. The Administrator and the Appellee have endeavored to confuse the issue by injecting numerous charges of unconstitutionality which do not bear analysis. Congress has consented that

the states may apply their statutes of limitations to rights arising under the Fair Labor Standards Act. Congress has recognized that by so doing the pattern of uniformity will not be extended into this particular feature of the law. By giving its consent, Congress has recognized that there is no interference with the administration of the Fair Labor Standards Act, that there is no discrimination against, or interference with, interstate commerce; and, that there is no discrimination against rights arising under federal law. We submit then that the only question in this case is whether the period permitted by statute is a reasonable one within which to institute action.

Neither the Appellee nor the Administrator have shown why a six months period is unreasonable, but a one year or two year period would be reasonable. Every argument advanced by them applies with equal force to a two year or six year statute. If a six months statute is rendered unconstitutional by the delay of the Administrator in making investigations, a six years statute could be rendered unconstitutional by the same dilatory non-action on his part. Surely constitutionality of a state law does not depend upon the speed with which a federal official performs his duties. The burden is upon those attacking the constitutionality of this statute to show that the period is unreasonable. Not only have they failed to maintain that burden; but, we assert, we have shown that the period is a reasonable one. We submit that the judgment of the trial court should be reversed, and one entered in favor of Appellant.

ANSWER OF CROSS APPELLEE TO BRIEF OF CROSS APPELLANT

Cross Appellant attacks only the portion of the judgment allowing an attorney's fee of \$250. He asserts that the intricacies of the question involved, the strenuousness of the opposition encountered and the result achieved are all factors which should be considered. To that we agree. However, an attorney realizes when a suit is brought that opposition may be encountered. Realizing that the constitutionality of this statute would be involved, he must have known that that opposition would be made. However, we think, upon analysis, it will appear clearly that the sole question involved here is whether a reasonable period was accorded Cross Appellant. The fact that the attorney for Cross Appellant has seen fit to confuse the case, and to inject intricate questions having no pertinence are factors to be considered in fixing a reasonable fee.

Respectfully submitted,

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